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6446

UPON THE

LAW

OF

LEGACIES,

BY R. S. DONNISON ROPER,

OF GRAY'S-INN, ESQ. BARRISTER AT LAW.

THE SECOND EDITION,

WITH VERY CONSIDERABLE ADDITIONS.

IN TWO VOLUMES.

VOL. I.

LONDON:

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1804.

ADVERTISEMENT.

IN the ſecond edition of the Treatiſe upon the Law of Legacies, the Author has conſiderably enlarged the plan of his original work, with a view to render it more extenſively uſeful. Inſtead of merely ſtating the principles of the law, with a reference to the authorities, he has added to thoſe principles a ſhort, and he hopes an accurate ſtatement of moſt of the caſes, in illuſtration of each particular ſubject. He has not copied the caſes verbatim, as they appear in the books of Reports, but ſuch parts only as were applicable to the ſubject under immediate conſideration, giving, in general, the judgments of the court at length, from a perſuaſion, that the ſolemn deciſions of judges ought to be ſet forth in their own language. The author, has deviated from this plan in the chapter "Of the Limitation of Chattels," in which he has been ſatisfied, except in one or two inſtances, with ſtating the principles and diſtinctions only, with a reference to the authorities in ſupport of them. He was induced to do this, in conſideration of the elaborate treatiſe of Mr. *Fearne*, upon Executory Deviſes, edited by the

late Mr. *Powell*, where will be found, in detail, moſt of the caſes, the repetition of which in this work, the author is convinced would be only increaſing the ſize and expence of it, without being attended with any ſuitable advantage to the reader. The author is fully aware of the importance and difficulty of his undertaking, but if his humble endeavours to reduce to a ſyſtem, and bring into one view, a ſubject of ſuch frequent recurrence as that of the Law of Legacies, ſhould be the means of lightening the toils, and facilitating the reſearches of that part of the profeſſion, which is more immediately occupied in queſtions in this branch of juriſprudence, whilſt he ſolicits indulgence, he will conſider his labours as amply recompenſed.

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ERRATA.

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Page 33. line 45. for *principal* read *principle.*
44. in notes—for *Shudald* read *Shudal.*
47.——— for 10 read 100.
99. line 8. for *coeret* read *coheret.*
185.——23. for (*u*) read (*x*).
186.——19. for *perſonally* read *perſonalty.*
372.——14. for *Clerks* read *Clerk.*
463. in notes dele *upon* after "VI" and inſert the word after *legacies.*
466. line 4. after *Will.* read as a note "So by the Regiſter's Book, but the report ſtates the copyhold not to have been ſurrendered."
473.——4. after *with*, inſert *a.*
496.——25. for *teſtor* read *teſtator.*

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123.——24. dele ſemicolon after only, and place it after *him.*
155.——38. dele the period after *proper*, and inſert a comma.
184.——36. for *or* read *for.*
216.——23. after *account*, inſert *of.*
223.——18. for *intereſts* read *intereſt.*
235. in notes—for 9 *Veſ. Jun. CC.* read 7 *Veſ. Jun. CC.*
268. line 34. after "die" for *was*, read *were.*
269.——4. transfer the *s* from *Georges*, to the preceding word *brother.*
281.——12. dele ſemicolon after *ſame.*
394.——10. for *her* read *his.*
413.——10. dele *A.*
419.——33. place the ſemicolon after *elect.*
493.——11. for *there* read *their.*
531.——12. for *is* read *it.*

A

TREATISE

UPON

THE LAW OF LEGACIES.

CHAP. I.

Of donations mortis cauſâ.

PROPER Legacies may be claſſed under two heads, *viz.* *general* or *pecuniary*, and *ſpecific*. The *firſt* may be defined, The teſtamentary gift of goods and chattels or money. *The latter*, The bequeſt of a particular thing ſpecified and diſtinguiſhed from all other things of the ſame kind, as of a houſe, a piece of plate, or a term for years.

There is an *improper* kind of legacy, termed a donation *mortis cauſâ*, which I ſhall make the ſubject of the preſent chapter.

Swinburne in his book on the Civil Law, divides it into three kinds:

Firſt—Where a perſon, *not terrified* by the apprehenſion of any *preſent peril*, but moved by the *general conſideration of man's mortality*, makes a gift.

Secondly—Where a perſon, moved by imminent danger, gives in ſuch manner, that the ſubject is *immediately* made his to whom it is given—

And thirdly—Where a perſon, being *in peril of death*, gives ſomething, but *not* ſo that it ſhould be *preſently his* who received it, but *in caſe only the giver die.*

It is obvious from conſidering the above diviſions of the ſubject, that the third alone is the proper *donation mortis cauſâ*, generally underſtood by the term; the other two being nothing more than pure irrevocable gifts *inter vivos*. This is alſo apparent from the definition of it given by *Juſtinian*, after the conteſt which prevailed on the ſubject ſubſided. "Mortis "cauſâ donatio eſt, quæ propter mortis ſit ſuſpicionem; cum "quis ita donat, ut ſi quid humanitus ei contigiſſet, haberet "is qui accepit, ſin autem ſupervixiſſet, is, qui donavit, "reciperet; vel ſi eum donationis pœnituiſſet, aut prior de-"ceſſerit is, cui donatum ſit. Hæ mortis cauſâ donationes "ad exemplum legatorum redactæ ſunt per omnia: nam cum

" prudentibus ambiguum fuerat, utrum donationis an legati " instar eam obtinere oporteret, et utriusque causæ quædam " habebat insignia et alii ad aliud genus eam retrahebant, a " nobis constitutum est, ut per omnia fere legatis connu- " meretur et sic procedat quemadmodum nostra constitutio " eam formavit, et in summâ mortis causâ donatio est, cum " magis se quis velit habere quàm eum cui donat, magisque " eum cui donat, quam hæredem suum." *(a)*

This kind of amphibious gift so far participates of the nature or quality of a legacy, that it is *ambulatory* and *imperfect* during the donor's life, it is therefore revocable, it is subject to debts upon a deficiency of assets *(b)*, and it is liable to the duties imposed upon legacies by the last Act of Parliament *(c)*. But in the following particulars, a donation *mortis causâ*, differs from a legacy, viz. It is not within the jurisdiction of the Ecclesiastical Court, it is not to be possessed by the executor; it does not regularly fall within an administration, nor requires any Act by or from the executor, to constitute a title in the donee.

In order to give effect to these donations, there must be an *actual delivery* of the thing intended to be given, or at least the best delivery of which it is capable; for where the thing delivered in lieu of the principal or thing intended to be given, in cases where the principal itself cannot be given, is mere evidence of the principal's existence, and no property is transferred to the donee by such delivery, or at the utmost a *right of action only*, such delivery with a view to a donation *mortis causâ* cannot be supported.

Upon this principle Lord *Hardwicke* decided in the case of *Ward v. Turner (d)*, that *delivery of receipts for South Sea Annuities*, was not such a delivery of the Annuities themselves as they were capable of, and therefore that the gift of them as an intended donation *mortis causâ* could not be established. But he inclined to think, that if a transfer of the Annuities had been made to the donee, the gift would have been complete to operate as a donation *mortis causâ*. The case was in substance to the following effect.—*W.* as executor of *M.* claimed specific parts of the personal estate of *F.* and also *South Sea Annuities*, as donations *mortis causâ* made to *M.* in his life-time by *F.* The manner in which those gifts were proved to have been made, was as follows—" I give you, *M.* those papers which are receipts for South Sea Annuities, and will serve you after I am dead. I give you *M.* all the goods and plate in this house," and a witness swore that *F.* declared

(a) Just. Inst. Tit. 7. De donationibus. *(b)* Smith *v.* Casen, mentioned by the reporter at the end of Drury *v.* Smith. 1 P. Will. 406. *(c)* 36 Geo. 3, cap. 52, sect. 7. *(d)* 2 Ves. 431.

to him and another perſon who alone were preſent, that he, *F.* gave to *M. all his houſehold goods, money, arrears of rent, and every thing which ſhould be found in his houſe, except his ſword, gun, and books.* Lord *Hardwicke* determined that the gift of the general perſonal eſtate of *F.* could not be ſupported, there being no pretence of any ſort of delivery—And with reſpect to the South-Sea Annuities, his Lordſhip, after taking a minute and accurate view of the *Roman* and *Civil* Law on this ſubject, and of all the caſes then decided in the Court of Chancery, adjudged that according to each law, delivery of the thing given is neceſſary to an effectual donation *mortis cauſâ*, and therefore that the delivery of the receipts for South-Sea Annuities, was not ſuch a delivery of the thing given, as to effectuate the gift, and compared it to the caſe of a mortgage, where a ſeparate receipt is given for the conſideration-money, in which caſe delivery of the receipt would not have been a good delivery of the poſſeſſion, nor given the mortgage as a donation *mortis cauſâ* by force of that Act. His Lordſhip was therefore of an opinion, that the gift of the South-Sea Annuities was merely *legatory*, and amounted to a *nuncupative* will, which was void by the Statute of Frauds and Perjuries. But he intimated, that an actual transfer of the ſtock would have been ſufficient to effectuate the intended donation. Alſo in *Miller* v. *Miller*, (*e*) delivery of a note for 100l. to the teſtator's wife, the note *not being a caſh note*, nor *payable to bearer*, was adjudged inſufficient to paſs to the donee, the money ſecured by it as a donation *mortis cauſâ*.

Bank notes being conſidered caſh, and *bonds*, from their particular nature, as ſecurities, have been adjudged capable of ſuch a delivery as is ſufficient to conſtitute a valid donation *mortis cauſâ*. *The former* were adjudged ſo in the caſes of *Miller* v. *Miller*, and *Hill* v. *Chapman* (*f*), the latter in the caſe of *Snellgrove* v. *Bailey* (*g*), which was afterwards acknowledged by Lord *Hardwicke* to be a proper determination in the caſe of *Ward* v. *Turner*. (*h*)

For the ſame reaſon that bank notes are conſidered as ſubjects proper for donations *mortis cauſâ*, it ſeems that *government ſecurities for money* will be ſo conſidered. Upon this principle the opinion of the *Maſter of the Rolls* in *Jones* v. *Selby* (*i*) may be ſupported, ſo far as regards the capability of the government tally to be the ſubject of a donation *mortis cauſâ*. Lord *Cowper* on appeal from the decree at the Rolls, does not appear to have entertained a doubt but that the tally was a fit ſubject for ſuch a donation, though he reverſed the decree under the idea that the

(*e*) 3 P. Will. 356. (*f*) 2 Bro. CC. 612. (*g*) 2 Atk. 214. (*h*) 2 Veſ. 431. (*i*) Ch. Pre. 300.

gift was not ſufficiently proved; or if it had been ſo, that it was ſatisfied by the ſubſequent teſtamentary proviſion of the donor. The plaintiff in that caſe was the relation and houſekeeper of *C. M.* with whom ſhe had lived upwards of 20 years. *C. M.* by his will, made in *March*, 1702, gave the plaintiff 500l. and about two or three months afterwards being deſirous of increaſing her fortune, and having a hair-trunk, in which were ſeveral things of value, *C. M.* ſent for her, and in the preſence of two of his ſervants, ſpoke thus—"*I give to my couſin this hair trunk, and all that is contained in it.*" He gave her the key and bid the ſervant take notice and remember it; and it was proved in the cauſe, that he ſeveral times afterwards inquired of his ſervants if they remembered the hair trunk, and once took a candle and ſhewed it them, that they might remember it. Three years afterwards *C. M.* made another will, revoking all former wills, and bequeathed to the plaintiff 1000l. but took no notice of the gift of the hair trunk, or any thing in it, and died. Four days after his death, upon opening the trunk in the preſence of ſeveral relations and other perſons, there were found in it ſeveral rings, pieces of gold, and among other things a tally upon the government for 500l. A ſuit being inſtituted by the plaintiff for the 500l. tally and the 1000l. the *Maſter of the Rolls* decreed them to her, and on appeal from this decree it was contended for the appellant, that the gift being in the nature of a legacy and ambulatory until the death of the teſtator, he by revoking all former wills revoked alſo this gift; but if this was not to be ſo conſidered, then that the legacy of 1000l. was a ſatisfaction of the 500l. tally. And that the plaintiff ſhould have proved, that the tally was in the trunk at the time of the gift. And of this opinion was Lord *Cowper*, obſerving, that theſe ſorts of donations, eſpecially where they were of the ſame kind with what was given by the will, ought to be fully proved in all their circumſtances, otherwiſe they ought not to be countenanced, becauſe it would open a way to perjury and fraud, greater than the ſtatutes had provided againſt;—That the plaintiff had not proved, by any one witneſs, that this tally was in the trunk at the time of the gift; that if it had been ſo, ſurely the teſtator would then, or when he had occaſion ſo often afterwards, have told the witneſſes of it—That it was ſtrange he ſhould bid them take notice of the trunk, and not mention the tally, which was the principal thing in it.—That all the plaintiff proved, was, its being there *when the trunk was opened*, which was three years after the gift, and four days after the teſtator's death.—That his Lordſhip ſat there to condemn frauds, and therefore might preſume them unleſs they proved the contrary." The court, however, conſidered the legacy of 1000l. a ſatisfaction for the 500l. tally, and therefore reverſed the decree at the Rolls.

It may be inferred from Lord Hardwicke's reaſoning in *Ward* v. *Turner*, that when the intended gift from its ſize or quantity is incapable of delivery in ſpecie, delivery of the thing by which poſſeſſion is to be obtained and the thing uſed, will be conſidered as ſuch a delivery of the ſubject itſelf, as with the other requiſites will conſtitute a complete donation *mortis cauſâ*. But in all caſes of donations *mortis cauſâ*, the delivery of the intended gift muſt have *a view to the death of the donor*, or elſe it cannot be ſupported.

Thus in a caſe (*m*) where *A.* having ſubſequent to his will, ſent for *M.* to his houſe, and obſerved that he was worth more than he thought of, and that his fortune was too much for one perſon, and therefore he would give away more than he had diſpoſed of by his will, deſired *J.* to give him out of his deſk ſeveral bonds and ſecurities to the amount of 3000l. and upwards, which he cancelled.—He then told *M.* he would give her 200l. and deſired *J.* to give him a check out of the drawer of his deſk, which he having done, he immediately filled it up, and ſigned and gave it to *M.*—He at the ſame time gave *J.* a promiſſory note for 1000l. It was determined upon queſtions, whether the gifts of the check and note could be ſupported as donations *mortis cauſâ*, that they could not, as the gifts of them were not made to take effect *in futuro*, with a view to the donor's death, but *in preſenti* and *irrevocably*.

Notwithſtanding the neceſſity of delivery, or ſymbolical delivery, to perfect a donation *mortis cauſâ* when there is no other evidence of the gift, it ſeems to be unſettled in our law whether proof of ſuch a gift appearing in *writing*, as *by deed*, without delivery of the articles intended to be given, is ſufficient to effectuate a complete donation *mortis cauſâ*. By the *Imperial* law, it was ſufficient (*n*), and by our own the better opinion appears to incline in favour of the gift (*o*). If therefore ſuch opinion be correct, it may be inferred, that the whole of a perſons chattels may be the ſubject of a donation *mortis cauſâ*, which could not be the caſe if delivery were always required.

There is a ſpecies of appointment in the nature of a donation *mortis cauſâ*, which may take effect without delivery, as when a perſon upon his death bed draws a bill upon his banker, and by writing indorſed upon it, declares that the money is to be applied for the benefit of a perſon for a particular purpoſe, which *neceſſarily ſuppoſes death*, this appointment will be conſidered in the nature of a donation *mortis cauſâ*, and ſupported as ſuch. Thus, in the caſe of *Lawſon* v. *Lawſon*, (*p*) *A.* on his death-bed drew a bill upon a goldſmith, to pay 100l. to *A*'s. wife, to *buy*

(*m*) Tate *v.* Hilbert, 2 Veſ. Jun. 111. (*n*) D. L. 39. Tit. 6. l. 28. (*o*) Johnſon *v.* Smith, 1 Veſ. 314. Tate *v.* Hilbert, 2 Veſ. Jun. 111. (*p*) 1. P. Will. 441.

mourning, and ſoon afterwards died. It was determined, that the bill was not a mere authority which expired upon *A's.* death, but operated as an appointment of ſuch a nature as before-mentioned.

In the above caſe of *Tate* v. *Hilbert*, (*q*) the Chancellor obſerved, that the report of the caſe of *Lawſon* v. *Lawſon*, in Peere Williams, was incorrect; as it appeared from the regiſter's book, that *the direction for mourning* was indorſed upon the bill, in the donor's hand-writing, and his Lordſhip approved of the deciſion.

(*q*) 2 Veſ. Jun. 111.

A donatio mortis causa must be made in contemplation of death & is the donors last ill wds. Wms on Exon 499. and as to the necessity of a delivery see Irons vs Smallpiece 2 Bar. & Ald. 551. Bunn vs Markham 2 Cr. & J. 232. 81. Ewing vs Ewing 2 Leigh 337. 4 Leigh 333

CHAP. II.

Of Specific Legacies, and the Ademption of them.

Sect. I. Of Specific Legacies.

A Specific individual legacy may be defined "The bequeſt of a particular thing ſpecified and diſtinguiſhed from all other things of the ſame kind, as of a horſe, a piece of plate, a term for years, and the like, which would veſt immediately with the aſſent of the executor." It differs from a pecuniary legacy in this—that if there be a deficiency of aſſets, the ſpecific legacy will not be liable to abate with the general pecuniary legacies (*a*); and on the other hand, if ſuch ſpecific legacy, be diſappointed, the ſpecific legatee will be intitled to no recompenſe or ſatisfaction out of the perſonal eſtate of the teſtator (*b*).

There are alſo legacies of *quantity in the nature of ſpecific legacies*;—as of ſo much money with reference to a particular fund for payment (*c*). This kind of ſpecific legacy differs ſo much in effect from that firſt deſcribed, that if the fund be called in or fail, the ſpecific legatee will not loſe his legacy, but be permitted to receive the value of it out of the general aſſets of the teſtator.

This ſpecies of ſpecific bequeſt has been queſtioned by a high legal authority, who denied the diſtinction in the caſe of *Aſhburner* v. *Mac Guire* (*d*), which, ſo far as relates to the preſent ſubject, was to this effect. *A.* bequeathed to his ſiſter in the following manner: "I bequeath to my ſiſter *J. A.* the intereſt ariſing from her huſband *W. A*'s. bond to me, for principal 3500l. ſterling, for life, to her ſeparate uſe, amounting to 175l. ſterling, *per annum*—Item, I bequeath the principal of the ſaid bond on the deceaſe of my ſaid ſiſter, to her four daughters, *E. A. S.* and *T.* to be equally divided among them."—The obligor having become a bankrupt, and a ſmall dividend only received from his eſtate, one of the queſtions which aroſe upon a bill filed by the teſtator's ſiſter and her children was, whether they were intitled to have the deficiency of the 3500l. made up out of the teſtator's aſſets, which depended upon another queſtion, viz. whether the legacy was or not ſpecific. In anſwer to the latter queſtion, Lord *Thurlow*, *C.* expreſſed himſelf to the following effect: "I am clear this is a ſpecific legacy, if the fortune of the teſtator had failed ſo

(*a*) 1 P. Will. 422—539. (*b*) 3 Bro. CC. 160. (*c*) Toucht. 432. Raym. 335. Finch, 303—152. (*d*) 2 Bro. CC. 108.

as not to satisfy all the pecuniary legacies, and the question had been whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted. When the testator made his will, 5300l. was due to him from *W. A.* by bond, he meant to relinquish that bond for the benefit of the family, not by way of release to the husband, but by way of settlement, and that this debt, whether it turned out well or ill, should go to the family, the interest to his sister for her life, the principal among her daughters. In this case, the bequest must be considered specific, *although the sum be mentioned*, for I cannot agree to Lord *Camden*'s distinction [between the gift of the sum due upon a security, and the gift of the security itself.] In questions upon legacies of debts, the cases have crept beyond the original principle, which was, the distinction between demonstrative and taxative legacies, and recourse had been had to the *animus adimendi*, which has nothing in common with the other principle. In *Pettiward* v. *Pettiward*, (*e*) the court was of opinion from all the circumstances, that the testator intended to give a legacy of 2000l. although the debts pointed out for the payment of it amounted to 1700l. only, and therefore decreed the deficiency to be made good out of the general assets. In Pawlet's case (*f*), the legacy was held a pure legacy, or a legacy *in numeratis*, and not *legatum nominis*, and although the debt was paid to the testator the legacy was decreed. In Lord *Castleton* v. Lord *Fanshaw* (*g*), a legacy of a debt was holden specific, although the sum was named. A definition of a specific legacy is given by Lord *Macclesfield*, in *Hinton* v. *Pinke* (*h*), and the advantages and disadvantages as between a specific and pecuniary legacy, are mentioned, and among other instances, that the legatee of a debt, which is lost by the insolvency of the debtor, shall have no contribution from the other legatees. In *Crockat* v. *Crockat* (*i*), the testator bequeathed the sum of 550l. which was then in Mr. *E.*'s hands, the testator, before making his will, had placed that sum in the hands of Mr. *E.* and had taken his note for it. He had also before making his will, drawn several bills on *E.* which had reduced the sum to 430l. It was held by the Master of the Rolls, that as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole 550l. as a legacy.

(*e*) Finch, 152. (*f*) Raym. 335. (*g*) 1 Eq. Ca. Abr. 298 (*h*) 1 P. Will. 539. (*i*) 2 P. Will. 164.

Lord *Camden* in the *Attorney General* v. *Parkin* (*k*), decided one point and left the other open. *Parkin* recites in his will that he had certain mortgages to the amount of and bonds to the amount of He gives all these by such enumeration to *Pembroke* College, *Cambridge*. To his sisters, who were next of kin, he gave annuities and declared they should have nothing more under his will; several sums were afterwards called in or paid before the testator's death. Lord *Camden* determined that the sisters were not disappointed by the declaration that they should have nothing but the annuities, he held the legacy to the college was not adeemed as to the sums paid in, upon the ground that the sum was named, which he at the same time admitted to be slight. The testator certainly meant to give every thing to the college, except the annuities. But the bequest is in the strictest form of a specific legacy. In *Cartwright* v. *Cartwright* (*l*), 18th July, 1775, before Lord *Bathurst*, the bequest was "I give 14000*l*. *for which I have sold my estate this day*, &c." The testator afterwards received the whole money, paid it to his banker, and drew out of his hands 1100*l*. of that money. And that Chancellor held this to be a legacy of quantity, and that the receiving was no ademption upon the authority of the *Attorney General* v. *Parkin*: but it is questionable whether that case supports that determination. In the case before me the testator plainly intended that his sister *S. A.* and her children should have the debt owing to him by her husband, secured as a provision for them." The decree was that the bond should be delivered to the wife and children, that they might receive a dividend out of the bankrupt's estate then unpaid, and also what (if any thing) might be paid in future in respect of such bond. Although this decree of Lord *Thurlow* may be right upon the principle, that from the manner of the gift, the intention appeared to give the *identical debt* (*m*), yet upon examination of the authorities determined since the last case, it appears doubtful whether the opinion given by Lord *Thurlow*, in disapprobation of the distinction between the bequest of a sum of money with reference to a security or debt for its payment, and the gift of the security itself, has been followed. In some late cases determined by Lord *Loughborough*, C. the distinction seems to have been stated and recognized.

(*n*) *A.* reciting in his will that he was possessed of a bill of exchange drawn in his favour, upon the East-India Company, and accepted by their order, and entered in their books for the

(*k*) Amb. 566. (*l*) Woodeson, 3 Syst. View, App. p. 8. (*m*) *Infra*, p. 16. (*n*) Coleman *v.* Coleman, 2 Ves. Jun. 639.

ſum of 1500l. bearing intereſt at 3 per cent, gave to his wife the intereſt of the bill for life, and directed that after her death, the ſame ſhould be ſold, and the money equally divided among ſeveral nephews and nieces, with ſurvivorſhip amongſt them, if any of them died during the wife's life, and he alſo gave to his wife, all his houſehold goods, &c. and appointed her executrix. The teſtator, after making his will, received from the Eaſt-India Company the amount of the bill, which conſtituted the bulk of his property, and lent the money upon perſonal ſecurity, and afterwards called in 100l. part of it, ſo that 1400l. only, was due to him at his death. Upon a bill filed by the nephews and nieces againſt the executrix, the queſtion was, whether the receipt by the teſtator of the amount of the bill during his life, was an ademption of the bequeſt, which depended alſo upon another queſtion, viz. what was the nature of the legacy? It was contended for the plaintiffs, that there could be no intention in the teſtator to adeem the legacy by receiving the amount of the bill, becauſe the bill was taken up and paid by the Company *in their uſual courſe of payments*; and that the legacy was not ſpecific, although it was given with reference to the bill as a ſecurity. And it was inſiſted for the defendant, that the bequeſt was ſpecific and adeemed, and that the diſtinction between a voluntary and compulſory payment was exploded. The Chancellor gave judgment to the following effect: "It has been ſaid, that the diſtinction between a *voluntary and compulſory* payment is exploded. The application of the diſtinction may often fail extremely in the particular caſe, but where the teſtator is compelled to receive payment of the debt, a pretty ſtrong preſumption ariſes, that there is no variation of intention; where he goes of himſelf, no neceſſity urging him, and deſtroys the form of the thing ſpecifically given, that is a good ground of argument the other way. I think Lord *Camden* decided very rightly [alluding to his deciſion in the *Attorney General* v. *Parkin*, Ambl. 566] and I remember he gave a very able opinion; he conſidered upon the whole will, that the intention was to give every thing to the college, not *that identical mortgage*, but *all* mortgages, *all* bonds, *all* ſecurities, it was only a method of deſcribing all his perſonal eſtate placed out upon intereſt. The diſtinction will not determine all caſes; the nature of the legacy, the particular will, muſt be conſidered; it is not a diſtinct propoſition to ſay ſuch a legacy is ſpecific, and that all ſpecific legacies are *ejuſdem Generis* (*o*). *There is a difference whether a ſpecific thing is given, or a legacy, equivalent to money, marked with*

(*o*) Finch, 303.

reference to a particular security as a bond; it is specific *quoad* the legatee, so as that it shall not abate when it is with reference to a particular fund; but the defendant has great difficulty from the particular frame of this will, for it is inconsistent with common sense, that he should have given in the manner he has, with reference to *a bit of paper*, and not with reference *to the sum*, giving an interest for life in the interest of a bill of exchange, he did not mean to destroy her interest for life if the bill were paid; he considered it as a permanent security, he had no distinction in his mind between a bill of exchange upon the *India Company* and *India Stock*, he creates survivorship after the death of his wife, who is now living. It is stronger with regard to a bill of exchange upon the Company, than a common bond, for to a reasonable certainty there must come a time, when that bill will be paid (*p*), but it is very common to let money rest upon a bond. Upon the particular frame of this will, there is no doubt it was in fact, the bulk of his fortune." The weight of this and the other cases next stated, joined with the great anxiety the Court has shewn upon every occasion, to construe legacies general, in order to avoid the consequences attending specific bequests, appears to have fixed the distinction as above stated.

(*q*) *A. B.* bequeathed to his nieces *J.* and *S.* a legacy of 4000*l.* with benefit of survivorship if either died under twenty-one, and if both died under that age, he directed the legacy to fall into his residuary estate; he then gave to *S. M.* 500*l.* at twenty-one, with the like direction as to its falling into the residue if *S. M.* died under age. He also bequeathed to *T. B.* 500*l.* for the trouble he thentofore had in the management of his, the testator's, affairs, and would have in the execution of the trusts of his will. The will then proceeded in this manner: "And I direct that all the aforesaid legacies shall be paid by and out of the monies which are now due and owing from *A. Davidson*, of Madras, Esq. upon bond; but my will is, that in case I shall receive the said monies, or alter the said security, such receipt or alteration shall not be deemed or construed a revocation of any or either of the said legacies, but the same shall, in such case, be paid by and out of some other part of my estate and effects and that all such legacies shall bear interest after the rate of 5*l.* *per cent.* *per annum*, from the time of my decease, and that the interest of the several legacies intended for the said *J.* and *S.* and *S. M.* shall be paid to them respectively, or be applied by my executors hereinafter named, for or towards the maintenance and education of them the said legatees, according

(*p*) See the case of Bronsdon *v.* Winter, Ambl. 57, stated *infrà*.
(*q*) Roberts *v.* Pocock, 4 Ves. Jun. 150.

to their ſeveral proviſions ſo intended for them reſpectively, until the ſaid principal legacies ſhall be paid and payable; and as to all the reſt, reſidue and remainder of my eſtate and effects, of what nature or kind ſoever, and whether in ſettlement or not, I give, deviſe, and bequeath the ſame unto my dear and loving wife *M. B.* for her own uſe and benefit abſolutely;" and he appointed his wife and the ſaid *T. B.* executor and executrix of his will. The bond was dated the 5th of May, 1783, to ſecure 5000l. and an arrear of intereſt. The amount of this debt being diminiſhed by receipts of the teſtator in his life-time, the ſum owing upon this ſecurity at his death, was 3583l. 9s. 6d. The obligor proving inſolvent, a queſtion aroſe, whether the above legacies, amounting to 5000l. given with a view to the money due upon the bond, ſhould be made good out of the general reſidue of the teſtator's eſtate, which depended upon another queſtion; whether they were to be conſidered ſpecific or pecuniary legacies; and by the Lord *Chancellor*—"The event which produced this queſtion is, that the effects of Mr. *Davidſon*, who reſided in India, have, from circumſtances well known to us, though he was of conſiderable reputed property, turned out to pay little or nothing. The queſtion ariſing upon an event that was not at all in the contemplation of the teſtator, leads to that ſort of diſcuſſion which is always unſatisfactory in the reſult, *viz.* what the teſtator would have done in a caſe that was not foreſeen by him. On the part of the reſiduary-legatee it was argued very plauſibly, that upon the whole of the will it was to be collected, that the teſtator had made an eſtimate of his fortune, that upon that fortune ſo eſtimated, calculating that he had a ſum of 5000l. well ſecured, he meant upon that ſuppoſition in his own mind, to give theſe particular legacies; and that excluſive of that, all the reſt of his fortune not defined in the will, but ſuppoſed to be defined, and eſtimated in his own imagination, he intended to give to his wife. Therefore it is concluded in the argument on one ſide, that if it had been in his view that a caſe might happen in which that 5000l. would be loſt, and the property would be diminiſhed to ſo great an extent, the probability is, he would not have given theſe legacies, at leaſt he would not have broken in, to ſuch an amount, upon the proviſion he meant to give to his wife: it is alſo contended, that he has ſpecified two ways, in which his ſpecific purpoſe might fail of effect, his calling in the money, or altering this ſecurity, and it was inſiſted with a good deal of plauſibility, that having expreſſed what was to be done in thoſe two caſes, an implication ariſes that it could not be his intention, in the caſe that has happened, that the legatees ſhould charge the reſidue. On the other ſide it was contended, and very plauſibly likewiſe, that the intention was definite with

regard to the legatees, that the ſum of his bounty is definite and abſolute with regard to them; that they ſtood in a near degree of relation to him—two were his nieces; the third was probably connected with him; the fourth is a legatee expreſsly for paſt ſervices, and as an inducement to him to act *quà* executor in the execution of the will, and in making good the reſidue to the wife; that with reſpect to her there is no definite intention; he gives to her what he did not know how otherwiſe to diſpoſe of; what the law would have diſpoſed of if he had not—a looſe floating reſidue; that they are not intitled to argue, that ſufficient appears upon the will to induce the Court to think he had made it upon a calculation. The arguments upon the one ſide and the other lead to this concluſion—that I cannot pronounce with any degree of certainty what the teſtator would have done in a caſe that never occurred to him. Firſt, it is evident there was no ſuppoſition, that could induce him to make a proviſion for the caſe that has happened. I am therefore to take the will as I find it, the court always feels itſelf diſpoſed to entertain that ſort of reaſoning. One would wiſh to do what one muſt ſuppoſe would have been the intention of the teſtator in the event that has happened, but it really amounts to conjecture only. If I were aſked my opinion, I muſt fairly ſay, the arguments upon the one ſide and the other balance themſelves very much. Theſe legacies I find given, certainly not as ſpecific legacies; and I cannot apply any rule, that has been laid down as to ſpecific legacies, to theſe. He has not given the bond, in form or in ſubſtance. The legacies are charged upon the bond, but they do not amount to it. Suppoſing as he did that the bond was a good ſecurity, it was worth much more than the amount of the legacies with intereſt at 5 per cent. from the death of the teſtator. Being in India, it could not be immediately called in. The benefit of the bond, therefore, belongs as a ſubſtantive part of his eſtate to the reſiduary legatee, charged, I think, with theſe legacies. The court would have laid hold of it, and would not have permitted it to be applied to the prejudice of the legatees, except for the payment of debts. In this reſpect it might be ſaid to be ſpecific; that they were not to abate: but you cannot argue that upon this will, for there are no other legacies. It rather aſſumes the queſtion to be decided. Is it then conditional legacy? The legacies to the two nieces and the other girl are contingent with regard to the principal: but there is no condition with regard to the intereſt of thoſe three, and it is remarkable, that they are to be paid with intereſt at 5 per cent. from his death, expreſsly for education and maintenance. If I am to adopt conjecture, it is a great ſtrain to hold, that if he were exerciſing his judgment, he ſhould have ſo provided, that

the maintenance ſhould be paid for three or four years, and then all at once ceaſe by the accident, to which ſuch legacies are liable, and that has happened in this inſtance. There is no principle, therefore, upon which I can ſay theſe legacies are not to be paid out of the reſidue, except by indulging in a ſtrain of conjecture, which is too ſlight and too dangerous for the court to act upon." And in another caſe—

(r) *A.* late of Jamaica, reciting in his will that he had remitted ſeveral ſums of money to England, which he had directed to be inveſted in Government funds, and which he believed had been laid out either in 3 per Cent. Bank Annuities, or in 3 per Cent. Conſols; and alſo reciting, it being his intention that the proviſions for his younger children ſhould be by *equal portions of ſuch Bank Annuities*, in which the ſaid monies had then been inveſted; in caſe therefore the ſums he had then inveſted, or might do before his death, ſhould not be ſufficient for the purpoſes therein mentioned, he authoriſed his executrix and executors to inveſt a ſufficient part of his eſtate in the purchaſe of ſo much more Bank Annuities, of the ſame kind as he had then already purchaſed, as would be ſufficient to anſwer the purpoſes in his will and after-mentioned. He bequeathed unto his executors 10,000l. current money of *Jamaica*, inveſted, or to be inveſted, by them in the public funds, purſuant to the ſame power, upon truſt, to receive the annual intereſt or dividends thereof, and pay and apply ſuch part of the ſame as they in their diſcretion ſhould think proper, for the maintenance of his daughter *A. M.* until marriage, or until ſhe attained the age of twenty-one; and from and after her attaining ſuch age or day of marriage, upon truſt to receive the intereſt and dividends of the ſaid 10,000l. and pay the ſame into the hands of the ſaid *A. M.* whoſe receipt alone ſhould be a ſufficient diſcharge to his executors, &c.; and after ſettling the 10,000l. and intereſt upon the children of *A. M.* and, in the event of none, upon her huſband, being the ſurvivor, he directed that if his daughter died under age and unmarried, the 10,000l. was to become part of his reſiduary eſtate. The teſtator alſo bequeathed to his executors a farther ſum of 10,000l. of current money of *Jamaica*, inveſted, or to be inveſted by them in the public funds, purſuant to the ſaid power, upon the ſame truſts, in favour of his daughter *J. G.* her children, and huſband, if ſhe left a huſband ſurviving her, as were declared in favour of his daughter *A. M.* &c. with a ſimilar direction that the laſt mentioned 10,000l. ſhould fall into the reſidue, if *J. G.* died under age and unmarried, which reſidue he gave to his

(r) Raymond *v.* Brodbelt, 5 Ves. Jun. 199. See alſo Kirby *v.* Potter, 4 Veſ. Jun. 748, *infra*.

ſon *F. Brodbelt*, and appointed him executor.—Prior to the date of the will, the teſtator had made ſeveral remittances to *England* at different times, for the purpoſe of being laid out in Bank 3 per cent annuities, which were accordingly inveſted—and after the date of his will, he made other remittances, which were alſo placed out upon government ſecurities, ſo that it appeared, there were ſtanding in the teſtator's name at the time of his death 15,500l. 3 per cent. conſols, Bank annuities, and 795l. 4 per cent. annuities.—Upon a bill in equity, by the legatees and their huſbands, againſt *F. Brodbelt*, praying that he might be decreed to transfer a moiety of the 15,500l. 3 per cent. conſol, Bank annuities, and a moiety of the 795l. Bank 4 per cent. annuities, to the accountant general in truſt, for the plaintiff *A. M.* for life, and upon her death on the other truſts of the will; and that he alſo might lay out ſuch a ſum of money, part of the teſtator's perſonal eſtate, as with the value of a moiety of the ſtock *according to the prices which the ſame bore at the time of his death*, would be equal to the ſum of 10,000l. *Jamaica* currency, in the purchaſe of 3 per cent. conſol, bank annuities, upon the ſame truſts; and praying ſimilar relief on behalf of *A. M.* and huſband.—It was inſiſted by the defendant, that according to the true conſtruction of the will, the amount of the current money which was inveſted in 15,500l. 3 per cent. conſol bank annuities, and, 795l. bank 4 per cent. annuities, was to be conſidered as applied in part payment and ſatisfaction of the ſeveral legacies of 10,000l. and therefore the ſtock ought to be received in part ſatisfaction of the legacies, as and for the ſum of 16,377l. 7s. 6d. Jamaica currency, being the amount of the current money, which was *laid out in the purchaſe of ſuch ſtock*. But the *Chancellor* ſaid "there is nothing fluctuating in this legacy, it muſt be 10,000l. currency. They could neither have more nor leſs. Suppoſe the inveſtments, the value of the ſtock purchaſed, had exceeded 20,000l. currency, they would have been limited: if the ſtock had riſen to *par*, they could not have had more than 10,000l. a piece currency. If it were ſpecific, the value of the ſtock of neceſſity muſt be aſcertained by the value at the death of the teſtator. But there is nothing ſpecific in it.—It is a legacy of 10,000l. currency each. They never can receive more, nor I apprehend, leſs.—It is not correct to ſay a legacy is either general or ſpecific; for *there is a general legacy not attended with the qualifications of a ſpecific legacy, yet with an appropriation upon part of the property.—That was the ground I went upon in (s) Roberts* v. *Pocock, and that is the caſe here.* The maſter muſt inquire, what ſum of money would have been neceſſary to have inveſted in the 3 per cents. to have paid 10,000l. currency

(s) *Supra*, p. 11.

to each of the legatees at the time of the teſtator's death and compute what is due to the plaintiffs upon their legacies, with intereſt, according to ſuch currency, to the time the whole inveſtment is made, upon ſuch ſum as the maſter ſhall find, would have been neceſſary for the inveſtments."

If, however, an intention can be collected from the will, that the teſtator meant to give the legatee the *identical* ſecurity, with the money due upon it, and not the money independent of ſuch ſecurity, the legacy will be conſidered ſpecific.

Accordingly in a caſe (*t*), where *A.* by codicil, dated the 29th of June, 1791, bequeathed to *E.* thus,— "Whereas I am intitled to 8000l. veſted in the bank of Meſſ. *B. C.* and *D.* for which ſum payable with intereſt at 3 per cent. one month after ſight at *N.* I have the promiſſory note of the ſaid bankers; now I give and bequeath unto my friend *E.* who lives with me, the before mentioned ſum of 8000l." *A.* died the 9th day of July, 1791; and upon the 13th of June, in the ſame year, being prior to the making of the codicil, he indorſed the note thus,—"I give this note unto *E.* which is along with me, for the love and regard I have for her." Upon a queſtion, whether this bequeſt was general or ſpecific, it was determined at the *Rolls*, that the bequeſt was ſpecific, his honor conſidering the indorſement on the note, together with the manner in which it was given, as ſufficient to ſhew, that the teſtator meant to give the note itſelf. In another caſe—

(*u*) *A.* bequeathed to his ſiſter *C.* the intereſt of 300l. upon bond, for life; and after her death, he gave to her daughter, *D*, the intereſt then due upon the *ſaid bond*, together with the principal, to be at her diſpoſal at twenty one. The teſtator was poſſeſſed of two bonds, one for ſecuring 300l. the other 200l. and the queſtion being, whether this legacy was ſpecific? The maſter of the Rolls was of opinion, that it was ſpecific, the words "ſaid bond" fixing it unqueſtionably to the identical bond the teſtator had at the date of his will. Again—

(*x*) *A.* by will dated in the year 1784, bequeathed in this manner, "I give and bequeath unto *J. B.* and *J. G.* who formerly lived with me as ſervants, the ſum of 30l. each, to be ſeverally paid to them within three months next after my deceaſe, out of 200l. due from *J. C.* to me upon bond. Alſo I give and bequeath unto *J. D.* and *J. S.* the ſum of 50l. each, to be ſeverally paid to them within three months next after my deceaſe, out of the ſaid ſum of 200l. due to me from the ſaid *J. C.* Alſo I give and bequeath unto the ſaid *J. C.* the ſum of 40l. being the remainder of the ſaid ſum of 200l. due from him to me as aforeſaid." *A.* after giving other legacies, be-

(*t*) Chaworth *v.* Beech, 4 Veſ. Jun. 555. (*u*) Innes *v.* Johnſon, 4 Veſ. Jun. 568. (*x*) Badrick *v.* Stephens, 3 Bro. CC. 431.

queathed the reſidue to *C.* and *E.* In the year 1786, *J. C.* paid the bond-debt, with intereſt to the teſtatrix, but whether voluntarily or on demand, did not appear. Queſtion, whether the payment adeemed the legacies? And the court decreed that it did, but the reaſons which led to the decree are not mentioned in Mr. Brown's report. In order to reconcile this decree with the other caſes, we may ſuppoſe, that from the manner of the bequeſt, viz. the gift of different ſums of money out of a debt ſecured by bond, in all the exact amount of the debt, the court was ſatisfied that the teſtator in doing ſo, intended to make diſtribution of the individual debt and no more, among the perſons to whom it was dealt out in parcels, ſo as to make the ſeveral bequeſts amount to a ſpecific individual legacy of the bond itſelf; therefore the debt being diſcharged after the date of the will, ſuch diſcharge was an ademption of the teſtamentary diſpoſition of it.

Legacies of ſtock are either general or ſpecific according to the intention of teſtators collected from the words in their wills. "*My*" preceding the word "*ſtock*" has been frequently adjudged ſufficient to render the bequeſt ſpecific, and it appears from the authorities referred to (*y*) that if I were to bequeath to another perſon in this manner "*my*" capital ſtock, ſuppoſe 1000l. in that of the India Company,"—or, "3000l. ſtock in the 3 per cent conſols bank annuities, being part of *my* ſtock now ſtanding in my name;"—or, 10l. *per annum* for life, to be paid out of *my* dividends of 400l. in the &c. now ſtanding in my name;"—Such ſeveral legacies would be ſpecific. But it ſeems ſettled that mere poſſeſſion by the teſtator at the time of making his will of ſtock or annuities, or of ſtock or annuities of equal or larger amount than the bequeſt, will not (without words of reference, or an intention appearing upon the will, that the teſtator meant the *identical* ſtock he was then poſſeſſed of) make ſuch bequeſt ſpecific. Accordingly—

(*z*) *A.* bequeathed 1000l. capital *South Sea Stock* to his wife, for life, for her ſole uſe and benefit, with a power of diſpoſition among her children. At the date of the will, *A.* was poſſeſſed of 1800l. South Sea Stock, which he afterwards reduced to 200l. but before his death, he increaſed by purchaſe the 200l. to 1600l. one of the queſtions was, whether the reduction of the ſtock after the date of the will, was not an ademption of the bequeſt of it? which involved this queſtion whether ſuch bequeſt was ſpecific? And as to that, Lord *Talbot*, C. was of an

(*y*) Sleech *v.* Thorington, and Drinkwater *v.* Falconer, 2 Ves. 560—623. Purſe *v.* Snaplin, 1 Atk. 416. Aſhburner *v.* MacGuire, 2 Bro. CC. 108. Barton *v.* Cooke, 5 Ves. Jun. 461. (*z*) Partridge *v.* Partridge. Forreſt. 226.

opinion that the gift was not ſpecific, obſerving, that it was not the particular ſtock he was poſſeſſed of which the teſtator gave, but the deviſe was merely deſcriptive of the nature of the thing given, of which he had ſufficient to anſwer the legacy at the time of his death. Again—

(*a*) *R.* bequeathed to *A. S.* "5000l. in the old annuity ſtock of the *South Sea* Company." And after two or three intervening legacies of ſtocks of different kinds, he "gave to his couſin *R. P.* 5000l. in the old annuity ſtock of the *South Sea* Company" and his reſiduary eſtate he bequeathed to *R. S.* The teſtator at the time of making his will, and at his death, had no more than 5000l. in old *South Sea* annuity-ſtock, which *A. S.* claimed under the teſtator's will. The queſtion was, whether the two legatees were intitled to have 5000l. apiece *South Sea* annuity ſtock, in which caſe reſort was to be made to the general aſſets, or whether the legacies were ſpecific ſo that there being only one 5000l. *South Sea* annuity ſtock, the two legatees would be under the neceſſity of abating *inter ſe*, and dividing the fund equally. The queſtion having been ſubmitted to the deciſion of the *Maſter of the Rolls*, he declared that as there was only one 5000l. old South-Sea annuity, one only could paſs by the will, which with the intereſt accrued due ſince the teſtator's death was diviſible between the two legatees—But this deciſion being unſatisfactory to the diſappointed legatees, they appealed from it to Lord *Hardwicke* C. who reverſed the decree, and ordered the two legacies to be made good out of the general aſſets. In anſwer to the objection raiſed at the bar, that the legacy to *R. P.* was ſpecific, and therefore if not found among the teſtator's aſſets, muſt fail, his lordſhip ſaid, that there are two kinds of gifts which are claſſed under the name of ſpecific legacies. Firſt, when a particular chattel is ſpecifically deſcribed and diſtinguiſhed from all other things of the ſame kind. Secondly—Something of a particular ſpecies which the executor may ſatisfy, by delivering ſomething of the ſame kind, as an horſe, &c. That the firſt kind may be more properly called an individual legacy, which if not found among the teſtator's effects, fails; or if firſt given to *A.* and then to *B.* they muſt divide: or if it be diſpoſed of in the life of the teſtator, it is an ademption of the bequeſt. Then his lordſhip obſerved that this gift was not confined to the particular 5000l. old *South Sea* annuity ſtock, which the teſtator had, and therefore did not fall within the firſt rule, but the ſecond, which was of a more liberal nature; it was a legacy conſiſting in quantity and number, and not confined to the ſtrictneſs of the firſt rule. In another caſe—

(*a*) Purſe *v.* Snaplin, 1 Atk. 415.

(*b*) *A.* bequeathed unto *G. R.* 400l. *East India* bonds, upon truſt to pay the intereſt unto his niece *R. H.* until her age of 21 or marriage, and then to pay her the ſaid 400l. *East India* bonds. The teſtatrix recited this bequeſt in her codicil, and another mentioned in her will of three *exchequer* orders which ſhe had ſince ſubſcribed into the bank of *England*; and ſhe ſubſtituted in the place of thoſe orders a pecuniary legacy. One *East India* bond only was found in the teſtatrix's poſſeſſion at her death. Queſtion whether the legacy was to be conſidered as a legacy of quantity, ſo as to amount to a direction to the executor to lay out ſo much of the reſiduary eſtate as would purchaſe it: or whether the legacy was to be conſidered (as contended for the charities, to which the reſidue was given,) as the gift of a ſpecific thing exiſting at the date of the will, though not found in the poſſeſſion of the teſtatrix at her death, and therefore adeemed. And the Maſter of the Rolls, Sir *Thomas Clarke*, was of opinion, that from the generality of the words, together with the inference ariſing from the probability, that if the bonds exiſted at the date of the will, but were ſold prior to the codicil, the teſtatrix would have noticed it, as in the inſtance of the *exchequer orders*, the legacy was not ſpecific, but of quantity, which he directed to be made good out of the general aſſets.

(*c*) *A.* among other legacies, directed 3920l. *bank annuities to be purchaſed out of his perſonal eſtate* for *B. C.* and *D.* Queſtion, whether theſe legacies were pecuniary or ſpecific? And Sir *Thomas Clarke*, determined that they were to be conſidered pecuniary.

(*d*) *A.* by will, dated the 19th day of Auguſt, 1732, deviſed as follows:—"I bequeath unto the ſaid *W. T.* and *G. I.* the ſum of 2000l. capital ſtock, in the *South Sea Company*, and alſo two navy bills, the one dated 7th *October*, 1730, (No. 721) for the principal ſum of 93l. 9s. 11d. and the other dated 1ſt *December*, 1730, (No. 5981) for the principal ſum of 555l. 16s. 9d. and the ſeveral ſums of money thereon due," which ſtock and navy bills the teſtator directed ſhould be placed at intereſt by his truſtees, for the benefit of his daughter and her children. The teſtator was poſſeſſed of 2000l. *South Sea* Stock, and no more at the time of making his will; and in the months of *February* and *March* next afterwards, he ſold 1500l. part of the 2000l. He alſo received the amount of the navy bills in due courſe of payment. Queſtion, whether the bequeſts of the 2000l. *South Sea* ſtock and navy bills were to be conſidered ſpecific or pecuniary? And *Verney*, M. R. determined that they were pecuniary.

(*b*) Sleech *v.* Thorington. 2 Veſ. 560. (*c*) Gibbons *v.* Hills, 1 Dickins. Rep. 324. (*d*) Bronſdon *v.* Winter, Ambl. 57.

"Some ſtreſs, ſaid he, has been laid upon the words "the ſum" of 2000l. in the will, as if by them the teſtator meant that quantity of ſtock only. But I think no weight is to be laid on that, for if he had ſaid 2000l. *South Sea* ſtock, that would eqally expreſs quantity, and any 2000l. ſtock would anſwer this legacy, for one ſtock does not differ from another, though one moveable does differ from another, and it is admitted that if the teſtator had poſſeſſed no ſtock, the executors muſt have bought 2000l. ſtock, which ſhews that any 2000l. ſtock would ſatisfy this bequeſt. The fact as proved, is, that though nothing particular is mentioned in the will to make the legacy of the ſtock ſpecific, yet the teſtator at the time of making his will, had the preciſe quantity of ſtock. Here ſeems the ſtreſs of this caſe. But the teſtator has not uſed words to make it ſpecific; and if legacies are to be ſpecific or not, from the teſtator's manner of wording them, and the natural deſcription would have been by words different from what are here uſed, why ſhould the court, from the circumſtance of the teſtator having juſt 2000l. ſtock, determine that he meant that individual ſtock? The navy bills are ſpecifically deſcribed, but the teſtator has given the *money due thereon*. What could he mean by that, but to give the money if they ſhould be paid off before his death? And as he could not help receiving them, though the civil law ſays the periſhing of a thing is an ademption; yet can the receiving it, which is for the preſervation of it, be an ademption alſo? If thoſe words, *and the monies due thereon*, had been omitted, it would have made no difference. Decree 2000l. ſtock, and the value of the navy bills, to be made good out of the teſtator's perſonal eſtate."

(*e*) *G.* Maſter of *Clare-hall*, *Cambridge*, after giving by his will ſeveral pecuniary legacies bequeathed "to *A.* 100l. to *B.* 100l. &c. to *Storey*'s Hoſpital 3,400l. in the 3 *per cents.* the annual dividends of which to be every half year divided betwixt four widows." It appeared that the teſtator at the time of making his will and at his death, had only 2200l. ſtanding in his name in the 3 *per cent.* annuities, of which 150l. belonged to other perſons, and that the remaining 2050l. were his own. There being a deficiency of aſſets; the queſtion was, whether the legacy of 3,400l. in the 3 *per cents.* was to be conſidered a ſpecific or pecuniary legacy? And the Lord *Chancellor* thus expreſſed himſelf—"In this caſe, I confeſs it does not appear to me that there is any queſtion of difficulty. On the face of the will, it is clearly a pecuniary legacy, and if it be to be turned into a ſpecific legacy, it muſt be upon other circumſtances. The form of the bequeſt is to give 3,400l. in the

(*e*) Peterborough *v.* Mortlock, 1 Bro. CC. 565.

3 *per cents.* The teſtator has been definite in applying the quota of maintenance to each widow.—On the face therefore of the will it is merely pecuniary, and extends only to a direction to buy ſuch a ſum in ſuch a ſtock. But it is ſaid, that although this may be ſo in the words, yet that circumſtances may be given in evidence, as to the ſtate of the funds in his poſſeſſion at the time of making the will.—If he had at the time of making his will, more ſtock than that which he deviſed, it is ſaid, it will be a ſpecific legacy; but that this is not the only caſe in which the court has been uſed to make this inference. When I ſay this, I do not mean to be underſtood, that the court has laid it down as a poſitive rule of law, but merely as an interpretation of evidence. In all caſes where the legacy is conſidered ſpecific, the court takes for granted, that the teſtator meant that particular fund, although he may be miſtaken in the deſcription of it. Now this intention ought to be made out by ſtrong circumſtances, which certainly do not exiſt in the preſent caſe. I am therefore of opinion, that this is a pecuniary legacy, and muſt conſequently abate in proportion with the reſt."

(*f*) *J. S.* by his will, gave the reſidue of his effects to be diſpoſed of as follows:—he bequeathed to *C. S.* "*the intereſt of* 100*l. New South Sea Annuities during his natural life, and after his death to be equally divided among his children*: And he gave unto each of *C. S*'s. children who ſhould be living at his the teſtator's death, *the ſum of* 50*l. each*, *New South Sea Annuities*, the intereſt to be paid from the time of his death, and the principal when they ſhould be of age. And he bequeathed unto *J. S.* the intereſt of 100*l.* New *South Sea Annuities*, for life, and after his death to devolve to his uncle *C. W.*"—The teſtator then gave ſome other legacies, and conſtituted *C. W.* reſiduary legatee and executor. At the time of his death, the teſtator had 800*l.* New *South Sea* Annuities ſtanding in his name, which he was alſo preſumed to have at the date of his will, though not ſo ſtated. The only queſtion was, whether the legacies of *South Sea* Annuities, were general or ſpecific, the fund being inſufficient to pay all the legacies. And the *Maſter of the Rolls* was of opinion that they were general legacies, and liable to abate with the other pecuniary legacies.

(*g*) *A.* among other legacies, bequeathed to *F. K.* the ſon of *A. K.* ["the ſum of 600*l.* and"] the words within the brackets being eraſed, "my annuity being a ſeparate order, No. 931, of 10*l. per annum*, payable out of his Majeſty's receipt of exchequer, for and during the remainder of my term and intereſt

(*f*) Simmons *v.* Vallance, 4 Bro. CC. 345. (*g*) Kirby *v.* Potter, 4 Veſ. Jun. 748. See alſo Sibley *v.* Perry, 7 Veſ. Jun. CC. 522, ſtated *infra*. S. P.

therein." *A.* by codicil, bequeathed to *F. K.* in the following manner, "my intention and will by my codicil, is to give to *F. K.* a legacy of 1000l. out of my reduced bank annuities 3 *per cents*, by my executor within one month from my deceaſe, for his integrity, ſobriety, and good behaviour, and deſerving perſon in every reſpect." The queſtion was, whether the legacy of 1000l. was ſpecific, the teſtator having left above 3000l. 3 *per cent.* reduced bank annuities, beſides other ſtock? And the *Maſter of the Rolls* thus expreſſed himſelf, "If the legacy given by the codicil had been "of my ſtock" or, "in my ſtock" or, "part of my ſtock" I ſhould have held it, clearly held it, a ſpecific gift of an aliquot part of the ſtock. The pecuniary legacies are directed to be paid within 6 months. The teſtator thinking that he had not done ſufficient for *F. K.* by the annuity of 10l. but that for his integrity, ſobriety, and good conduct, he deſerved ſomething more, gives him this legacy by the codicil. A gift of 1000l. no doubt means 1000l. ſterling, but undoubtedly that may be explained. It is ſaid the words that follow, "out of my reduced bank annuities 3 *per cents.*" are ſynonimous to the words I have ſtated, "part of my ſtock, &c." They are not ſynonimous by any means, for 1000l. may be raiſed by ſelling as much ſtock, as would produce that ſum, or by borrowing upon it; ſuppoſe it were 1000l. out of a leaſehold houſe, it would be a charge. The direction as to the month is very material, if light circumſtances are to be called in aid, why ſhould one month be mentioned? Why ſhould not the transfer be immediately? Why not as ſoon as conveniently might be, giving him all the accruing dividends in the mean time? The only effect of that direction would be, to deprive him of the dividends which could not be the intention. There certainly muſt be time for the actual transfer, but the teſtator might have given *F. K.* all the dividends. Every one knows, that a ſpecific legacy of a *corpus*, paſſes from the death of the teſtator. It veſts immediately from that time. There is a very untechnical expreſſion uſed with regard to ſtock. There is literally no ſuch thing as 100l. ſtock. The 3 *per cents* are perpetual annuities only, granted for ever, redeemable by the public upon payment of a certain ſum of money. Knowing however, that in common parlance, people ſpeaking of ſtock, will ſo expreſs themſelves, we muſt apply it. But whenever there is a legacy of a given ſum, there muſt be poſitive proof, that it does not mean ſterling money, in order to make it ſpecific. If this legacy had been expreſſed thus, "Part of *my* reduced bank annuities" or, "in *my* reduced bank annuities," I could not have conſidered that the teſtator meant any thing but an identical part of that *corpus*; but when the phraſe is "1000l. *out* of my reduced bank annu-

ities" the ſenſe is, that the executor ſhall raiſe 1000l. by ſelling ſo much of that ſtock, and this being a fund to which he can have immediate recourſe, he is ordered to do ſo within a month. Therefore, though in my private opinion, there is great doubt what he meant, I muſt hold this to be a legacy of 1000l. to be raiſed and paid out of that fund as a ſpecific ſecurity, and more eaſily come at, than a legacy out of his eſtate in general might have been.

The caſe of *Aſhton* v. *Aſhton* (*b*), may, at firſt ſight, appear irreconcileable with the authorities laſt ſtated, but on nearer view, the opinion given by Lord *Talbot*, will appear to have been well founded.—*A.* bequeathed to truſtees, 6000l. *South Sea* Annuities, in truſt, *to ſell and lay out in the purchaſe of lands*, to be ſettled, &c. and afterwards by codicil, gave them a further ſum of 1200l. to the ſame uſes. The teſtator having 5360l. only in annuities at the date of his will, the court determined that the legacy was ſpecific, and therefore, that the deficiency ſhould not be ſupplied out of the general perſonal eſtate. It is obvious to the reader, that in the above caſe, no expreſs words of reference were uſed by the teſtator in regard to any particular annuities which he might have at the date of his will, therefore the inference that he intended thoſe identical annuities, muſt have ariſen from ſome other circumſtance, which was that of the gift of the annuities to the truſtees in form of a *preſent legacy* in truſt *to ſell*, and the difference in amount between the annuities which the teſtator had at the time of making his will, and thoſe expreſſed to be bequeathed by him, muſt have proceeded merely upon a miſcalculation of his property.

There is a caſe which appears to me, to militate directly againſt the adjudications laſt referred to, and it was to the following effect (*i*). *A.* having at the date of his will 2702l. 3s. Bank Annuities, and 2000l. Eaſt India Stock, made the following bequeſt, "To my two daughters *B.* and *C.* I give 2702l. 3s. capital ſtock in the Bank of *England*, and 2000l. ſterling capital ſtock in the *Engliſh Eaſt India* Company, to be equally divided between them." The teſtator before his death ſold 702l. 3s. of the Bank Stock, ſo that at the time of his deceaſe he had only 2000l. Bank Stock, and 2000l. Eaſt India Stock. The queſtion was whether the legacies were ſpecific? And it was determined by Sir *John Forteſcue*, M. R. that they were ſpecific, upon the principle of equality in amount of the ſtock given, with the quantity in poſſeſſion of the teſtator when he made his will.

It appears from the report of the judgment in the laſt caſe,

(*b*) Forreſt, 152, 3 P. Will. 384, S. C. (*i*) Jeffreys *v.* Jeffreys, 3 Atk. 120.

that the *Maſter of the Rolls* endeavoured to avoid the preſſure of ſuch of the ſeveral authorities before ſtated, as were cited on the occaſion to ſhew that the legacies were pecuniary, by aſſigning different reaſons as the grounds of the ſeveral decrees pronounced in them. It is obvious, however, from the peruſal of thoſe caſes, that the principle which produced the decrees was a want of words referring to the ſtock exiſting at the date of the will or of manifeſt intention in the teſtator that he alluded to it, and not the ſimple circumſtance of the teſtator poſſeſſing or not poſſeſſing ſtock at that period of any particular amount. Accordingly in *Bronſdon* v. *Winter* (*k*), the ſtock which the teſtator had at the time of making his will, was *equal* to the ſtock bequeathed, and in *Partridge* v. *Partridge*, and *Kirby* v. *Potter* (*l*), the ſtock in the poſſeſſion of the teſtator, *exceeded* the amount of that given, nevertheleſs for want of proper words to fix the legacies to the then exiſting ſtock, they were adjudged general legacies only. I think, therefore, that we may reaſonably infer, that the caſe of *Jeffreys* v. *Jeffreys* would not be ſo decided at the preſent day.

It has been already obſerved, that teſtamentary gifts of ſtock are either ſpecific or pecuniary, according to the intention of teſtators collected from their wills; if therefore, a teſtator having ſtock at the date of his will, diſpoſe of it in fractional parts, ſo as to raiſe a clear inference, that he intended the identical ſtock he then poſſeſſed, ſuch a bequeſt will have all the eſſentials of a ſpecific legacy. Thus in *Sleech* v. *Thorington* (*m*), one of the queſtions in that caſe aroſe upon the following bequeſt.—The teſtatrix gave 2413l. 13s. to different perſons in ſeveral parcels and in different proportions, by the name of *South Sea* annuity ſtock, or *South Sea* annuities, and bequeathed to her coachman *the remaining* 13l. 13s. *South Sea* ſtock, ſtanding in her name. The teſtatrix died poſſeſſed of no more than 2157l. 12s. 1d. *South Sea* annuities: queſtion, whether the deficiency ſhould be made up out of the general aſſets, which depended upon this, whether the legacies were pecuniary or ſpecific? And Sir *Thomas Clarke*, M. R. held them to be ſpecific, and therefore not entitled to a contribution from the general perſonal eſtate; he ſaid that the laſt bequeſt, in favour of the coachman, was a ſpecific parcel of the ſtock, part of a larger ſum ſtanding in the name of the teſtatrix;—That none of them were independent, but all connected from the original bequeſt of the firſt portion of *South Sea* Stock to the laſt, which ſhe computed to be a reſidue, though erroneouſly. That the legacies were connected by the laſt being given by way of remainder, and this was a ſpecific bequeſt of ſuch an individual identical

(*k*) *Supra.* (*l*) *Supra.* (*m*) 2 Veſ. 561. 564.

thing as the teſtatrix apprehended ſhe had;—He alſo ſaid it was material that there was a direction to the executors to ſell, and convert part of the ſtock into money, which direction it was impoſſible the teſtatrix could have given, if ſhe meant part of the ſtock ſhould be purchaſed with her perſonal eſtate, that would have been a vain thing, and was laid hold of in *Aſhton* v. *Aſhton* (*n*), which was in point. He therefore decreed as above.

In inſtances where the ſtock ſpecifically bequeathed may have been ſold after the teſtator's death, the Court of Chancery will order it to be replaced, according to the value of ſtock at the expiration of the year after the teſtator's death, as the ſpecific ſtock was then transferable to the legatees (*o*).

Money, if properly deſcribed, may be the ſubject of ſpecific bequeſts. Thus if *A.* give to *B.* a ſum of money, depoſited in ſuch a cheſt or bag, "or in ſuch a perſon's hands, or in ſuch a trunk or book." Theſe and the like deſcriptions will amount to a ſufficient ſpecification of the thing, or money intended to be given ſo as to conſtitute the legacy ſpecific. But as money, *quâ* money bears no ear-mark, it is incapable of being the ſubject of a ſpecific bequeſt, without relation to ſome collateral thing, by which the amount of it may be aſcertained, and the money itſelf identified. The bequeſt therefore, of a ſum of money to be laid out in the purchaſe of lands, "or to be inveſted in government ſecurities," "or to be applied in the purchaſe of annuities," is a mere pecuniary legacy; the legatee in the above inſtances not being able to ſever the ſums given, ſo as to ſay, that he has a right to thoſe identical ſums in ſpecie; which he ſhould be prepared to do, in order to make his legacy ſpecific (*p*).

As money accompanied with a proper deſcription, may be the ſubject of a ſpecific bequeſt, ſo may the general perſonal eſtate of a teſtator, under particular circumſtances. Thus if *A.* poſſeſſing perſonal property both in *England* and *Jamaica*, bequeathed all his perſonal eſtate in *Jamaica* to *B.* and made no diſpoſition of his property in *England*, the legacy to *B.* would be ſpecific, and he would be entitled to have the debts and general legacies diſcharged out of the teſtator's aſſets in *England*. In like manner, if *G.* having perſonal eſtate at three different houſes, viz. *D. E.* and *F.* bequeathed to *H.* all his perſonal eſtate at *D. D's.* legacy would be ſpecific, and not liable to contribute with the property at *E.* and *F.* in payment of general legacies. (*q*)

(*n*) *Supra.* (*o*) Morley *v.* Bird, 3 Veſ. Jun. 631. (*p*) Lawſon *v.* Stitch, 1 Atk. 507. Hinton *v.* Pinke, 1 P. Will. 539. Alton *v.* Medlicot, cited Hume *v.* Edwards, 3 Atk. 693. Lewen *v.* Lewen, 2 Veſ. 417. (*q*) Sayer *v.* Sayer, Prec. ch. 392. Niſbet v. Murray, 5 Veſ. Jun. 149.

out of other parts of the will, with regard to the intention to fix upon other funds charges that would primarily fall upon that fund: and that muſt be made out not by conjectures, but by plain declaration or manifeſt intention. That is the principle upon which it is agreed theſe caſes are to be conſtrued and the intention has never been conſidered manifeſt, merely from a diſpoſition of the perſonal eſtate in the ſame clauſe with the land which muſt be taken to be ſpecifically given. But theſe caſes do not go the length, that if the enjoyment is portioned out in life-intereſts, with remainders over, it is ſpecific. I am clearly of opinion therefore, that this is not a caſe, in which the perſonal eſtate is in this ſenſe ſpecifically given, with a direction that it ſhall remain ſpecifically ſuch as it was at the teſtator's death, and the purpoſes for which it is given are thoſe, for which it is admitted there is a general rule, that theſe periſhable funds are to be converted in ſuch a way as to produce capital, bearing intereſt."

SECT. II. *On the Ademption of Specific Legacies.*

THE ſubject of ademption of ſpecific legacies, is neceſſarily involved in conſiderable uncertainty, as the fact of ademption muſt always depend upon the particular will, the nature of the legacy, and the intention of teſtators: there ſeems, however, to be ſome rules eſtabliſhed by the caſes relating to this matter, which ſeem to be as follows:—

When legacies are given *quâ* money, with reference to particular funds for payment, although ſuch bequeſts are in their nature ſpecific, and the funds may fail, from being called in or otherwiſe, yet the legacies will not be defeated by thoſe circumſtances.—Thus in *Pulsford* v. *Hunter* (*a*), the teſtator by codicil, dated the 12th of *December*, 1779, after giving two annuities of ten guineas each, expreſſed himſelf to this effect:—"This is an account of *value* now in my poſſeſſion, and out of which the ſaid yearly ſums are to be paid; bank notes to the amount of 190*l*. caſh 10*l*. 10*s*. ditto in the hands of Mr. *Drummond*, 2476*l*. 5*s*. 2676*l*. 15*s*. the intereſt of the remaining part, to be applied for the uſe and education of my grand-children, till they arrive at the age of 21. And the principal to be then equally divided among them, to the reaſonable ſatisfaction of my executors or ſucceſſors." It appeared from the maſter's report, that the teſtator had no caſh in his poſſeſſion at the time of his death, but was poſſeſſed of two bank notes, of the value together of 30*l*. and one *Hunter*, in or about *January*, 1779, at the teſtator's requeſt, depoſited in the hands of Meſſrs. *Drummond*, two navy bills of the amount in the whole 2462*l*. 5*s*. 4*d*. the property of the teſtator; and that on the 16th *Auguſt*, 1790, the navy bills and intereſt were paid off by government by 17 exchequer bills of 100*l*. each, and by caſh 921*l*. 1*s*. making together 2621*l*. 1*s*. which exchequer bills remained in the hands of Meſſrs. *Drummond*, in the name of *Hunter*, and the 921*l*. 1*s*. placed to his account: That on the 5th of *September*, 1780, *Hunter* drew a draft on *Drummond* in favour of the teſtator, for 21*l*. 1*s*. which was paid, and he afterwards took out the remainder of the ſum, and bought nine other exchequer bills, of the value of 100*l*. each, and depoſited them with *Drummond* in his own name, which made up 26 exchequer

(*a*) 3 Bro. CC. 416. See alſo the caſes of Coleman *v*. Coleman, Roberts *v*. Pocock, and Bronſdon *v*. Winter, ſtated *ſupra*.

bills: Afterwards ſixteen of the bills were depoſited with Meſſrs. *Drummond*, in the teſtator's name, by his deſire; and the remaining ten bills were paid to *Hunter* and *B.* in ſatisfaction of a debt of 1000l. and it appeared that the teſtator never had in his own name any property in the hands of Meſſrs. *Drummond*, except as above ſtated. One of the queſtions was, whether as at the time of the bequeſt in the codicil, the property in the hands of Meſſrs. *Drummond* were navy bills, and had been altered ſubſequently in the manner before-mentioned, the legacy was not adeemed, or whether the grand-children were entitled to the ſixteen exchequer bills remaining in the hands of *Drummond* at the time of the teſtator's death? And the Lord *Chancellor* ſaid, that the queſtion in theſe caſes, was, whether the ſpecification of the thing bequeathed, remained at the time of the teſtator's death, the ſame as it was at the time of the bequeſt. That therefore, if this had been a bequeſt of navy bills, he muſt have thought that the grand-children could not take the exchequer bills, becauſe the ſpecification was not the ſame. The thing given would not have been in exiſtence at the teſtator's death, but the word in the codicil is "*value.*" Now the exchequer bills remaining, anſwer the deſcription, and are *value* in the hands of *Drummonds*. Therefore his lordſhip held, that the bequeſt was ſpecific, and the grand-children intitled to the ſixteen exchequer bills.

When ſpecific ſecurities are given by will, or when legacies are given out of particular funds, if it appear that the teſtator intended to diſpoſe of *aliquot* parts of thoſe funds, and the ſecurities or funds, do not wholly, or do in part only exiſt at the teſtator's death, the legacies will be either totally or in part adeemed, as the caſe may happen. Accordingly, if *I.* bequeathed to *B.* 3000l. ſtock in the 3 per cent conſols, bank annuities, being part of my ſtock then ſtanding in my name, if that ſtock ſhould not be found in my name at my death, having been previouſly ſold, or if part of it only ſhould have been diſpoſed of, the legacy to *B.* would be totally or partially adeemed according to the circumſtances. (*b*)

A diſtinction has been made by the early caſes, between the circumſtance when a teſtator received a debt, ſpecifically bequeathed at his own inſtance, and when the debt was paid to him by the debtor, without any application or ſolicitation. The deciſion being in the former caſe, that receipt of the debt was an ademption of the legacy; but in the latter, that payment was no ademption: And upon this reaſoning, that if, after the ſpecific bequeſt of a debt, the teſtator upon application or by compulſion obtained it, an inference aroſe, that by extinguiſh-

(*b*) See the laſt caſe. Alſo Aſhton *v.* Aſhton, and Badrick *v.* Stephens, ſtated *ſupra*.

ing the demand, he intended to defeat the legacy; but when the teſtator without ſolicitation, and *ex mero motu* of the debtor, or in the regular courſe of payment, received the debt ſpecifically bequeathed, as no inference could be made, that by ſuch a receipt he intended to defeat his prior diſpoſition; the non-exiſtence of the debt at his death under ſuch circumſtances, was not allowed to diſappoint the ſpecific legatee *(c)*. But more modern authorities than thoſe laſt referred to have exploded this diſtinction, *as a fixed poſitive rule*, under the idea that the reaſon for eſtabliſhing the difference was unſatisfactory; for it is not true, that in all caſes when a teſtator applies for, or compels payment of his debt, that he is induced to do ſo, from an intention to defeat a prior teſtamentary diſpoſition of it, but from prudential motives, ſuch as the apparently declining circumſtances of the debtor, and the like *(d)*. Upon the whole, the rule of equity as applicable to this queſtion, may perhaps, be conſidered as ſettled, according to what is laid down by the Maſter of the Rolls in the caſe of *Hambling* v. *Liſter (e)*, "That if a debt be ſpecifically given, and afterwards be received by the teſtator, and no reaſon appears why it was called in, ſuch receipt will amount to an ademption. But if any reaſon be given for the receipt of it, [and according to *Drinkwater* v. *Falkener (f)*, by entering into evidence *quo animo*, the debt was called in] no ademption will be effected." The caſe of *Hambling* v. *Liſter*, was to this effect. *E.* the wife of *L.* being intitled to 840l. lent upon mortgage in the names of truſtees, made her will purſuant to a power, and gave to *G.* 100l. to be paid by the truſtees out of the mortgage-money, as ſoon as the ſame ſhould be received; ſhe alſo gave to *H.* 100l. more, to be paid out of the ſaid mortgage, and directed the truſtees to place other 200l. in their names, at intereſt, out of the ſaid mortgage-money, when received, for the benefit of her niece *E. M.* After the making of the will, there was a conſiderable arrear of intereſt upon the mortgage, and the principal and intereſt, amounting to 1240l. The teſtatrix agreed to a compoſition, and accepted 1000l. for the whole that was due, and within a ſhort time afterwards, ſhe laid out the money ſo received upon other ſecurities. Queſtion, whether receipt of the mortgage-money under the above circumſtances was an ademption; and the *Maſter of the Rolls* decided that

(c) Partridge *v.* Partridge. Forreſt, 228. Crockat *v.* Crockat, 2 P. Will. 164. Rider *v.* Wager, ibid. 328. *(d)* Thomond *v.* Suffolk, 1 P. Will. 464. Ford *v.* Fleming, 1 P. Will. 469. Attorney General *v.* Parkin, Ambl. 566. Aſhburner *v.* Mac Guire, 2 Bro. CC. 108. *(e)* Ambl. 401. See alſo Lord Loughborough's obſervations in Coleman *v.* Coleman, *ſupra*. Alſo Bronſdon *v.* Winter, *ſupra*. *(f)* 2 Veſ. 624.

This poſition does not ſeem to be correct, it being now ſettled, that th

it was not, but decreed that the legacy for which the ſuit was inſtituted ſhould be paid out of the money received, that was placed out upon other ſecurities.

Although the fund ſpecifically bequeathed, be annihilated or called in by the teſtator after the making of his will, yet if it be replaced, and have exiſtence at the time of his death, it ſeems that the teſtamentary gift of it will take effect. Suppoſe then the ſpecific fund to conſiſt of 10,000l. 3 per cent. conſolidated bank annuities, if the teſtator ſold the ſtock after the date of his will, and afterwards purchaſed an equal or leſs quantity, the legatee would be entitled to ſo much as appeared ſtanding in the teſtator's name at the period of his death. The principle is this; that if the ſale by the teſtator of the ſpecific fund be conſidered as an alteration of intention, ſo as to lay the foundation for concluding that he meant to adeem the bequeſt of it, the ſubſequent replacement cannot have leſs effect than to afford equal evidence of intention that he meant the legatee to have his legacy according to the will *(g)*. But in order to revive the ſpecific gift under thoſe circumſtances, it is neceſſary that the money ſhould be replaced in the ſame fund as that mentioned in the will, ſo as to anſwer the deſcription of the bequeſt, or the legacy will be adeemed wholly or in part, as the caſe may be. Thus if the bequeſt were of ſo much *South Sea* annuities, the replacement muſt be in that kind of ſtock, for the purpoſe of intitling the legatee to claim it under the ſpecification in the will *(h)*.

In regard to the neceſſity of the thing bequeathed, anſwering the deſcription of the will at the death of the teſtator, an exception muſt be made in inſtances where the alteration in the fund is effected *by mere act or operation of law*, for ſuch alteration will not be an ademption of the legacy, although the terms of the bequeſt ſhould happen to be inſufficient to embrace the property in its new character. And this ſeems to be the reaſon; the alteration in the fund not being made by the teſtator, but by the legiſlature, and no intention to adeem appearing from the circumſtance, it would be unjuſt to defeat the diſpoſitions in the will by a proviſion in law, which might not be foreſeen, and could not be prevented. Accordingly in a caſe *(i)* where *A.* bequeathed 1000l. capital *South Sea Stock*, to *B.*; *A.* was poſſeſſed of 1800l. *South Sea Stock*, at the making of his will, which he afterwards reduced to 200l. but prior to his death, which happened in July, 1773, he repurchaſed ſo much ſtock, as with the ſum laſt mentioned, amounted to

(g) Partridge *v.* Partridge, Forreſt, 226. Drinkwater *v.* Falconer, 2 Veſ. 625. (h) Crockat *v.* Crockat, 2 P. Will. 164. See alſo Pulſford *v.* Hunter, 3 Bro. CC. 416. ſtated *ſupra*. (i) Partridge *v.* Partridge, Forreſt, 226. Bronſdon *v.* Winter. Ambl. 57. S. P.

1600l. *South Sea Stock.* In the month of *June*, preceding *A*'s death, the act of parliament took place for changing three-fourths of the capital *South Sea Stock* into *annuities*; and it was one of the queſtions in the cauſe, whether the ſtatute did not adeem the legacy by altering the nature of the fund? But it was determined that as ſuch alteration was made by mere *act of law*, it ſhould not be permitted to defeat the bequeſt to the prejudice of the legatee.

If the fund be varied only *in a ſmall degree*, or be *differently arranged* at the teſtator's death, from what it was at the date of his teſtament, as the fund ſtill remains the *ſame in ſubſtance*, ſuch variation or arrangement will not cauſe an ademption of the legacy. Accordingly,

(*k*) *A. B.* and *C.* being partners in the banking-buſineſs, under articles made in the year 1743, *A.* after reciting in his will, that he had reſerved to himſelf by the articles, nine in twelve parts of the profits to ariſe by banking in his houſe at *T.* did (in purſuance of the power alſo reſerved thereby) diſpoſe of ſuch nine parts in manner following; one ninth part to *B.* and *C.* in addition to the ſhares they were entitled to under the articles, as a recompence for the trouble they ſhould incur in carrying on the banking buſineſs for the benefit of his wife and children; another ninth part to his wife; three ninths to his eldeſt ſon, and four ninths to his two youngeſt ſons. The articles of 1743, expired after the date of the will, and *A.* entered into new articles with *B.* and *C.* at the end of a year afterwards, by which the buſineſs was divided into twenty-four parts, or ſhares, and fourteen of them were declared to belong to *A.* ſeven to *B.* and three to *C.* There was a proviſion in the articles of 1743, that if any of the partners died during the partnerſhip, under thoſe or any future articles, the ſhares of the perſons ſo dying, ſhould belong to their executors; there were alſo ſecret, or, what is called ſide-articles entered into by them, but no new ones were made when the parties entered into the laſt articles. Upon a queſtion whether the ſecond articles were an ademption or a revocation of *A.*'s will, Lord *Hardwicke* determined, that they were not, obſerving, that although the fund was *altered and differently arranged*, it was in fact, *ſubſiſting* at *A.*'s death: and his lordſhip ſaid, "that when a perſon in trade makes proviſion out of his ſhare for his family, and afterwards renews the partnerſhip, by which perhaps his intereſt is varied, yet it is not a revocation, if it were, it would occaſion great confuſion.

Upon the ſame principal of intention, it is laid down as a rule, liable, however, to be rebutted, by ſhewing a different

(*k*) Backwell *v.* Child, Amb. 260.

intention, that if the bequeſt be of goods, &c. ſpecified to be be in a *particular place*, as in the teſtator's houſe at *B.* they muſt be there at his death, in order to give effect to the legacy; for if they be removed before that period, it would be preſumed, that the teſtator had altered his intention, and meant to adeem the bequeſt. (*l*)

The caſe of *Shaftſbury* v. *Shaftſbury*, (*m*) ſeems a very ſtrong determination in favour of the rule; it was to this effect.

A. before he went abroad, for the benefit of his health, made his will, and bequeathed to his wife, all the plate, &c. which ſhould be in his houſe at *C.* at the time of his death. While *A.* was from home, his ſteward procured the abſolute owner of the houſe, to accept a ſurrender of *A.*'s leaſe, and in conſequence of it, removed *A.*'s plate, &c. to another houſe belonging to *A.* which tranſaction was afterwards approved of by *A.* And upon a queſtion whether the removal of the plate, &c. under the above circumſtances, was an ademption of the bequeſt, it was determined in the affirmative.

It is obvious that the removal of the plate, &c. in the laſt caſe was of neceſſity, in conſequence of the ſurrender before mentioned, and evinced no intention of adeeming, which is ever eſſential to ademptions, for which reaſon it ſeems doubtful whether this caſe would be followed under ſimilar circumſtances, and eſpecially as it is ſettled, that if goods ſpecifically bequeathed, are removed for a neceſſary purpoſe, as to ſave them from fire, &c. ſuch removal would be no ademption. The above obſervations ſeem to be conſiderably ſtrengthened by the following caſe—

(*n*) *B.* by his will, after giving to his wife 1000l. bequeathed to her "*all his plate, linen, and furniture, in his houſe in S.*" together with the leaſe of the ſaid houſe, for the reſidue of the term. The teſtator had two houſes, that in *S.* and another in *T.* at each of which he reſided alternately. When he made his will, all his plate, linen, and furniture, were in the houſe at *S.* except ſufficient linen to ſerve the family one week without waſhing, which was in the houſe at *T.* It appeared that the teſtator had only one ſervice of plate, which with all the linen, except ſufficient for one week's uſe without waſhing, always accompanied him and family from one houſe to the other, according as they changed their reſidence. There happened to be no plate, except a ſilver bowl, in the houſe at *S.* at the teſtator's death, but his widow the legatee not only claimed the linen and furniture, which was in that houſe at the laſt mentioned period, but alſo ſuch plate, linen, and furniture, as were in the houſe when he made his will, or ſuch as he at that time had been in the habit of uſing

(*l*) Green *v.* Symonds. 1 Bro. CC. 129. notes. (*m*) 2 Vern. 747. (*n*) Land *v.* Devaynes, 4 Brown, CC. 537.

in his houſe at *S.* during his reſidence in it, and which were carrried backwards and forwards between the two houſes as he reſided at either. And the Lord *Chancellor* ſaid, that the teſtator having only one ſet of plate and linen, which was not ſufficient for both houſes, was accuſtomed to remove them with himſelf. It was therefore like a general deviſe of all his plate and linen; his lordſhip therefore ordered all the plate to be delivered to the widow, and alſo all the linen, except the linen for the week that was left at the houſe in *T.*

(*o*) In *Chapman* v. *Hart*, Lord *Hardwicke* took a diſtinction between goods in a houſe, and goods in a ſhip, his lordſhip deciding in the latter caſe, that removal of goods out of the ſhip before the teſtator's death, was no ademption, and ſaid, that a bequeſt of property on board of ſhip, muſt be ſuppoſed to be made with a view to the ſeveral contingencies and accidents to which they were liable; and that if it ſhould be determined, that in caſe of any accident the goods not on board at the teſtator's death, ſhould not paſs to the legatee, ſuch a deciſion would defeat ſeveral marine wills.

If the thing ſpecifically given be ſo altered or changed at the time of the teſtator's death, as to leave no part of it conſiſting of the ſame materials as at the date of the will, yet if ſuch alteration be made gradually, the thorough change of the ſubject will not effect an ademption. Accordingly, if *A.* bequeathed to *B.* a particular houſe, and afterwards repaired it ſo often as to leave no part of the old materials ſtanding at his death, the ſpecific deviſe of it to *B.* would not be defeated (*p*). And if the ſubject of a ſpecific bequeſt, be not completely alienated or diſpoſed of, but pledged or pawned only by the teſtator, the executor muſt redeem it for the ſpecific legatee (*q*).

With reſpect to the ademption of ſpecific deviſes of lands held under leaſes for terms of years or for lives, by the ſubſequent ſurrenders of the old leaſes, for the purpoſe of renewal, the following rules and diſtinctions may be collected from the caſes determined on the ſubject.

Firſt,—As to leaſes for *terms of years.*

When from the manner of the gift by will it appears, that the teſtator in diſpoſing of his leaſehold property, only intended to paſs his preſent intereſt therein, and he after the date of his will, ſurrenders effectually the old, and takes a new leaſe of the lands, ſuch act will amount to an ademption of the ſpecific deviſe. So that if the terms of the bequeſt were thus:—"The leaſe which I now hold, &c." or, "the leaſe of my lands, &c." I give to *B.* without mentioning the teſtator's

(*o*) 1 Veſ. 873. (*p*) Swinb. Part 7. Sect. 20. pages 523-4.
(*q*) Swinb. p. 525. 2 Freem. 272.

eſtate or intereſt therein, a ſubſequent renewal would be an ademption of the bequeſt.

(r) *A.* in the year 1732, bequeathed all his college leaſes which he then held of *Magdalen College*, to *E.* his mother, to be ſold immediately after his death, with directions that the money ſhould be divided among ſeveral perſons, including the mother, whom he appointed executrix and reſiduary legatee. *A.* after making his will, ſurrendered his college leaſes, and accepted two new ones, one in *December*, 1736, the other in *Auguſt*, 1740. And paid large ſums of money for fines, but the laſt leaſe was not ſealed with the college ſeal, till after the teſtator's death. There being no republication of the will, the queſtion was, whether the ſpecific deviſe of the leaſes was adeemed by the ſubſequent ſurrender of the old, and the acceptance of the new leaſes? And Lord *Hardwicke*, C. determined that the ſurrender of the old, and acceptance of the new leaſe in 1736, was an ademption, becauſe the words of deviſe being in the preſent tenſe, and therefore applicable only to the leaſe then in exiſtence, could not poſſibly comprehend the renewed leaſe. But as to the new leaſe of 1740, he held that as the new leaſe was void for want of the college ſeal, the deviſe of the old leaſe was not adeemed by the mere attempt of the teſtator to renew. Again—

(s) *A.* deviſed in this manner, "all my lands, tenements, and hereditaments, at *Weſtow*, *in Yorkſhire*, and all my tithes and eccleſiaſtical dues, payable out of *Weſtow*, aforeſaid, or any other towns or places near the ſame" I give to *B.* At the date of this will, *A.* was ſeiſed in fee of her eſtate at *Weſtow*, and poſſeſſed of a leaſe of theſe tithes under the Archbiſhop of *York*, but after making the will, ſhe ſurrendered that leaſe, and took a new one, of which ſhe was poſſeſſed at the time of her death. Queſtion, whether the deviſe of the tithes was adeemed by the ſurrender of the old leaſe? And by Sir *John Strange*, M. R. "no doubt but that by this will, the teſtatrix deſigned both her eſtates and tithes ſhould go together, the gift of them in the ſame breath and ſentence to the ſame perſon [favours the conſtruction]; however, if by any accident, that ſuppoſed intent cannot take effect in point of law, the rule of law muſt take place, and conſequently ſo far as ſhe has not well deviſed, it muſt fail. I own, I cannot ſee any real diſtinction between the words in this will, "all my tithes at *Weſtow*," and if it had been "all my leaſe or intereſt in that leaſe at Weſtow," becauſe that muſt refer to the intereſt ſhe had at the time of making. That intereſt does not remain at

(r) Abney *v.* Miller, 2 Atk. 597. (s) Rudſtone *v.* Anderſon, 2 Veſ. 419.

the death of the teſtatrix, for by the ſurrender, ſhe ſo far altered her intereſt, that what were her tithes under the leaſe at making the will, cannot be conſidered under the foot of this clauſe, as being the ſame at the time of her death; but ſhe acquired a new eſtate in them, to commence at, and run out to a different period of time. The queſtion then is, whether this is in ſuch a light as will ſufficiently paſs theſe tithes, her property in which was ſo greatly altered by the ſurrender and acceptance of a new leaſe? *Abney* v. *Miller* (*t*), as ſtated to me, is in point, for it was held, that the leaſe being thus altered, the intereſt under the new leaſe would not paſs. There is no difference between that caſe and this. There it was mentioned "his eſtate," here it is "my tithes" that is, "my eſtate in the tithes," ſo that though it may be a little harſh in a caſe of this nature, to ſeparate theſe intereſts, yet I cannot ſee how the court can ſay, theſe tithes under the deſcription of this will, have not received ſuch an alteration in their nature as to require republication of the will. It muſt then be conſidered that the teſtatrix acquired a new intereſt ſubſequent to the will, which cannot paſs by the words of the deviſe." In another caſe—

(*u*) *A.* by his will "gave and bequeathed to *T. B.* the perpetual advowſon and diſpoſal of the living or rectory of *Waverdon* aforeſaid for ever, together with the tithes of all ſorts thereof." The teſtator held the rectory by leaſe from *New-College, Oxford*, for a term of ten years from the year 1766, and after the date of the will, he ſurrendered that leaſe, and took a new one in the year 1770 for ten years more, and was poſſeſſed of the rectory under that leaſe at the time of his death. One of the queſtions was, whether the advowſon paſſed by the will, or the deviſe of it was adeemed by the ſurrender of the old leaſe, and acceptance of a new one? And by the lord *Chancellor*, "I have looked over *Abney* v. *Miller* (*x*), and all the other caſes on the ſubject, and find I muſt contradict them all if I did not conſtrue this deviſe of the leaſehold eſtate which was afterwards ſurrendered, a lapſed deviſe, therefore it muſt be part of the perſonal eſtate."—And

In *Coppin* v. *Fernyhough* (*y*) the teſtator being ſeiſed of a freehold farm, called *Chanland-Farm*, and poſſeſſed of the manor of *Caddington-Major*, held by leaſe from the prebendary of the prebend of *Caddington-Major*, in the cathedral church of St. *Paul, London*, for twenty-one years, which leaſe was uſually renewed every ſeven years, and which he held at the

(*t*) Laſt Caſe. (*u*) Hone *v.* Medcraft, 1 Bro. CC. 263. (*x*) *Suprà.* (*y*) 2 Bro. CC. 292. Alſo the Attorney-General *v.* Downing, Ambl. 571. S. P.

time of making his will, by a leaſe for twenty-one years, dated the 20th of *November*, 1736, (and which he afterwards renewed on the 18th of *November*, 1740) by his will of the 20th of *October*, 1737, gave to his daughter an annuity charged upon *Chanland-Farm*, and other premiſes, and alſo upon all his leaſehold eſtates in the pariſh of *Caddington*, and deviſed the ſame ſubject to the annuity, to the ſame uſes, intents and purpoſes, as were declared of his freehold lands, limited in ſtrict ſettlement by a prior deed. After this will, the teſtator purchaſed a prebendal leaſe for three lives, and made a codicil to his will, dated the 27th of *July*, 1741, which he declared was to be annexed to his will, by which he gave his newly acquired eſtate to truſtees, to uſes, &c. One of the queſtions was, whether the renewal of the leaſe of *Caddington-Major* manor, was or was not an ademption of the deviſe of it? And the court determined that the codicil was a republication of the will, which enabled the will to paſs the renewed leaſe, thereby neceſſarily admitting, that the renewal was an ademption prior to the codicil.

In the ſeveral caſes laſt ſtated, it appears that the ground upon which the court of chancery decided, that renewed intereſts in leaſehold property, would not paſs under prior wills, was, from the words of the deviſe being inſufficient to extend to them. If, therefore, the terms of the bequeſt are ſufficiently comprehenſive to embrace renewed intereſts, they will be allowed to paſs to the deviſee, as in the following inſtances.—Suppoſe a man deviſed to another thus "all the eſtate, right and intereſt he had to come in the leaſe at the time of his death," or "all his intereſt therein," or "all the rights and advantages accruing from it;" theſe and ſuch like words would be ſufficient to include intereſts in leaſehold lands acquired by renewal after the date of the will. To illuſtrate this by examples;—

(z) *A. B.* was a prebendary of *Tachbrooke*, to which there was a corps belonging, that fell to him in the year 1714; from that time he demiſed it to one of his children for twenty-one years, and ſuch child who was named leſſee, always executed a declaration of truſt, purporting that her or his name was uſed, in truſt for the father for ſo many years of the term as he ſhould live, and then for ſuch perſon or perſons, as he by deed or will ſhould appoint, and in default thereof, to and among all his children equally. The leſſees generally ſurrendered the leaſe yearly, and *A. B.* granted a new one. In *Auguſt*, 1735, *A. B.* leaſed the prebendal eſtate to his daughter *S.*, who executed a declaration of truſt. On the 19th of *January*, 1735-6,

(z) Carte *v.* Carte, 3 Atk. 174. Ambl. 28. SC.

A. B. made his will, and after giving ſome legacies, bequeathed to his eldeſt ſon *T. B.* all the reſt of his goods, chattels and eſtate, whether real or perſonal, and made him executor. Then by a ſupplemental clauſe: "Item, it is my mind and will that my eldeſt ſon *T. B.* ſhall have the diſpoſal of the leaſe of my prebend of *Tachbrooke* made to my daughter *S.* and that he ſhould receive to himſelf all the *profits* and *advantages* arifing and accruing from it. And by another clauſe, which was contended by *T. B.* to be made after the 24th of *September*, 1739, the teſtator took notice that he had made his ſon *T. B.* executor and reſiduary legatee, and that if he ſhould be moleſted and proſecuted by government, by which he might incur a forfeiture, or could not be his executor, then he made another ſon *U. B.* and his daughter *S.* executors, and gave them what he had given to *T. B.* The leaſe of 1735, deviſed by the will, was ſurrendered in 1736, and ſeveral new leaſes were made yearly, until the leaſe in queſtion, which was dated the 24th of *September*, 1739, and made to *S.* who on the ſame day executed a declaration of truſt, in truſt for the father, for ſo many years of the term as he ſhould live, then for ſuch perſon or perſons as he ſhould by deed or will appoint, and in default thereof, for the benefit of *S.* and every other child of the teſtator. The general queſtion was, whether the benefit of the renewed leaſe in 1739, paſſed to *T. B.* by the will in 1735-6, either by the original will, or ſubſequent additions to the will, which depended upon theſe conſiderations.—Firſt, whether the will was ſufficient to paſs not only the truſt of the leaſes then in being, but alſo the benefit of ſubſequent renewals, in caſe there had been no new declarations.—Secondly, whether the new declarations of truſt that had been made on the ſubſequent leaſe, would make any alteration by the different penning of them, and whether they amounted to a revocation; And, thirdly, ſuppoſing there was a revocation of the will, either by the ſubſequent renewal, or by the new declarations which were made upon the new leaſes, whether there was ſufficient evidence of the republication of the will, after the leaſe and declarations of truſt of the 24th of *September*, 1739. And as to the firſt, Lord *Hardwicke*, C. was of opinion that the will was ſufficient to paſs not only the truſt of the leaſes then in being, but alſo the benefit of ſubſequent renewals; obſerving that there was no queſtion concerning the inability to deviſe, but the want of a proper form of words. If that were ſo, and a form of words may be uſed which would paſs a ſubſequent renewed intereſt after making the will, then the queſtion was, whether the words here were ſufficient to paſs that intereſt: and clearly they were. I take the conſtruction of this clauſe (ſaid his

lordſhip) " in as extenſive a manner, as if he had particularly recited and repeated the leaſe and declaration of truſt, and given it to his ſon, and the effect would have been to have given him the whole truſt. What was that? moſt certainly not the truſt of the then exiſting term only, but alſo all the renewals, and extends to all future leaſes, as well as thoſe in being: An objection has been made that this declares the truſt upon the preſent term in *T. B.* It is not only a truſt to preſerve the legal eſtate to *T. B.* in the profits, but to preſerve the truſt in the whole intereſt, by giving him a power to ſurrender it to ſuch uſe as he ſhould appoint. What is the whole of it taken together? Why, that *T. B.* ſhould receive the profits of the leaſe during his life, and that it ſhall be ſurrendered as he ſhall direct. What for? Why, to take a new intereſt for the benefit of the ſame truſt. If the teſtator had recited in his will as before, could there be any doubt, but that would have given to *T. B.* the benefit of this leaſe and all ſubſequent renewals? It is the ſame as if a man poſſeſſed of a term, had given that leaſe, and all ſuch leaſes as he ſhould take, which amounts to the ſame thing. This is only making a conſiſtent conſtruction. Suppoſe, inſtead of the declaration of truſt for the teſtator to ſuch uſes, &c. the declaration of truſt had been for particular perſons, and the leaſe had been renewed from time to time; nobody would have doubted but that the ſubſequent renewals would have been for the benefit of the perſons named in the declaration of truſt: Will it make a difference, if the perſons are not named? No. Suppoſe it had been for ſuch perſons as he ſhould by any deed, not by will, appoint, and he had made a declaration for particular perſons, by an inſtrument diſtinct from this declaration. Would not that have been for the benefit of ſuch perſons? The deviſe in the will extends to the whole truſt, and the word "*advantages*" is undoubtedly ſufficient to take in all the advantages and benefits belonging to the truſt. It compriſed not only the profits, but the renewals which are conſequential, the words of the will are very ſufficient to paſs not only the truſt and beneficial intereſt then ſubſiſting, but alſo the renewed leaſe." The chancellor, after farther obſerving that the teſtator's making new declarations of truſt upon every ſurrender, *ex abundanti cautela*, created all the difficulty, ſaid he ſhould avoid determining the ſecond queſtion, as he was of opinion that the will was republiſhed by the addition made to it after the leaſe and declaration of truſt of the 24th of *September*, 1739, and therefore it was competent to paſs that leaſe, although it ſhould be admitted that the will was revoked by the different truſts declared upon the granting of ſuch leaſe. In another caſe—

(*a*) *A.* deviſed in this manner, "*All and ſingular my leaſehold eſtate*, goods, chattels, and perſonal eſtate whatſoever, I give to my daughter *J.*" he then deviſed in the ſame manner to *L.* if *J.* died without leaving iſſue; and in the reſiduary clauſe he repeated the words "all and ſingular." After the date of the will, the teſtator renewed a leaſe with the dean and chapter of *Windſor*. Queſtion, whether the renewal of the leaſe was not an ademption? And by lord *Hardwicke*, C. "there is no doubt but that the leaſehold eſtate paſſed by the will, the plaintiff goes upon a miſtake, that this is a ſpecific legacy: it is nothing like it, for it is only an enumeration of the ſeveral particulars of his perſonal eſtate, but yet is a general deviſe of the whole. The court never ſtrains to make a revocation, but notwithſtanding, if in point of law it is a revocation, it muſt have its effect. But there is no foundation to ſay, that what the teſtator has done in this caſe is a revocation. Suppoſe the teſtator had purchaſed a new leaſe, would not that have paſſed? Why then ſhould not a new term in a leaſe equally paſs?" His lordſhip therefore determined that the renewal was no ademption.

Secondly—as to *leaſes for lives*.

The renewal of leaſes determinable upon lives will always create an ademption of ſpecific deviſes of them, as they are conſidered in the nature of freehold intereſts, conſequently new intereſts acquired by renewal, cannot paſs by a will made prior to ſuch acquiſition (*b*).

(*a*) Stirling *v.* Lydiard, 3 Atk. 199. (*b*) Marwood *v.* Turner. 3 P. Will. 170. Digby *v.* Legard, Dicken's Rep. 500. Abney *v.* Miller, 2 Atk. 597.

CHAP. III.

Of Pecuniary Legacies, and their Ademption.

It is a general rule that where an immediate advancement or proviſion is made by a parent, or by another perſon in *loco parentis*, for a child before provided for by the will of the parent or of ſuch perſon, the ſubſequent advancement or proviſion will be conſidered an ademption or ſatisfaction of the legacy.

(*a*) *A.* having four daughters, made his will and deviſed to *B.* one of his daughters, 1000l. and then bequeathed to all of them 1500l. a piece for portions. *B.* having married during her father's life, he gave her on that occaſion 4000l. as a portion. Queſtion, whether the advancement was an ademption of the legacies given to *B.* by the will? And the court determined, that the 4000l. ſhould be conſidered a ſatisfaction of the legacy of 1500l. given as a portion by the will, but not an ademption of the 1000l. legacy, that being general, and not bequeathed as a portion.

(*b*) *B.* by his will, gave to his daughter *D. W.* 300l. if ſhe ſhould be then living and unmarried, or married with her mother's conſent firſt obtained in writing. But if ſhe happened to be married, when it was appointed to be paid to her, and that without her mother's conſent, then the teſtator gave her 200l. only, payable at her age of twenty-three years. The daughter married *C.* in the life of the teſtator without conſent, though after a treaty and offer of 200l. portion, which had been refuſed. After the marriage, the huſband applied for her fortune, upon which the teſtator offered him 200l. and his, the teſtator's wife ſaid, that if ſhe ſurvived her huſband, and had the means, ſhe would give her daughter another 100l.; yet the huſband would not then accept the 200l. but afterwards wrote a letter for it, and it was accordingly paid. The huſband having become a bankrupt, and the teſtator being dead, the plaintiff, as the huſband's aſſignee, claimed the legacy of 200l. or 300l. under the above will. But his claim was not allowed upon the ground, that the advancement of the 200l. by the teſtator, was a ſatisfaction of the legacy of 200l. And that as to the 300l. it being given upon the daughter marrying

(*a*) Ward *v.* Lant, Pre. Ch. 182. (*b*) Hartop *v.* Whitmore, in a note to Warren *v.* Warren, 1 Bro. CC. 306. alſo reported Ch. Pre. 541.

with the mother's conſent, which could only be intended after the father's death, never became due.

(*c*) In the marriage ſettlement of *H. P.* in 1726, a term was created to raiſe 10,000l. as portions for the daughters of the marriage, in caſe of failure of iſſue male, with a declaration, that if he advanced to any of his daughters on marriage or otherwiſe, any of the portions thereby appointed to be raiſed; or if upon his death there ſhould come to them any lands or tenements from him, ſuch ſums and the value of ſuch lands, ſhould be deemed part of the portions, unleſs he declared the contrary. By a ſettlement made by the duke of *Newcaſtle* in 1741, a term was created on the *Nottinghamſhire* eſtate to raiſe 10,000l. for ſuch younger children as *H. P.* ſhould appoint. Upon the 7th of *September*, 1748, *H. P.* having iſſue four daughters, *L. F. G.* and *M.* by will, appointed the 10,000l. under the firſt term, to be raiſed for the benefit of all his daughters, except *L.* at eighteen or marriage. He then directed the *Nottinghamſhire* eſtate to be ſold after the death of the duke of *Newcaſtle*, and the money to be divided among all his daughters except *L.* whom he had provided for with a portion. He deviſed his eſtate at *Eſther* to his daughter *F.* and her iſſue in ſtrict ſettlement, with remainder to his other daughters in like manner. He alſo bequeathed his perſonal eſtate to his daughters, except *L.* and gave the reſidue of his real eſtate to all his daughters in tail, as tenants in common, but if any of them became entitled to the duke of *Newcaſtle*'s eſtate, her intereſt in the above deviſes was to ceaſe and go over. By a codicil of the 9th of *September*, 1751, the teſtator charged his eſtate at *Eſther* with 5000l. for each of his youngeſt daughters, as ſhould not be entitled to the poſſeſſion and enjoyment of the houſe and park at *Eſther*, with a proviſo, &c. In *Auguſt*, 1752, upon the marriage of his daughter *G.* with *W.* he gave her a portion of 20,000l. by appointing 9950l. of the 10,000l. to be raiſed by the term of years in the deed of 1741, and by mortgaging his reverſionary intereſt in the *Nottinghamſhire* eſtate, which ſum of 20,000l. was recited to be in full of her portion or fortune. One of the queſtions was, whether the advancement by the teſtator to his daughter *G.* upon her marriage, was a ſatisfaction for any, and which of the proviſions made for her by his will and codicil? And by lord *Hardwicke*, C. "There are many caſes of a father making

(*c*) Watſon *v.* the earl of Lincoln, Ambl. 325. alſo Jenkins *v.* Powell and Elkinhead's Caſe, 2 Vern. 115—257. Biggleſton *v.* Grubb, 2 Atk. 48. Tapper *v.* Chalcroft, cited in Spinks *v.* Robins, Ibid. 492. Irod *v.* Hurſt, 2 Freem. 244. Scotton *v.* Scotton, 1 Stra. 235. Clarke *v.* Burgoine, 1 Dicken's Rep. 353. See alſo the ſeveral caſes ſtated *infrà*.

a proviſion for a child by way of portion by his will, and afterwards giving ſuch child a portion in his lifetime, and it has been held an ademption of the legacy. The reaſons are, firſt, that this court inclines *againſt double portions*; ſecondly, that the court conſiders it as a performance of what was intended to be done, and a payment of the debt of nature which he owed to his child. Thoſe caſes between father and child depend on other grounds than caſes of ſatisfaction between other perſons. *Hartop* v. *Whitmore (d)*, went upon thoſe reaſons. *G.* had advanced to her in the teſtator's lifetime 20,000l. which, by her marriage ſettlement, is recited to be in full of her portion or fortune. It muſt, therefore, be a ſatisfaction of what ſhe could claim under the will or ſettlement of her father by way of portion. In the firſt place it was ſo, of what ſhe could claim under her father's marriage ſettlement; and in the next place it was ſo, of what ſhe could claim out of the 10,000l. ſecured by the deed of 1741, and alſo of the 5,000l. charged upon the *Eſther* eſtate. I am alſo of opinion, that the one third of the money to ariſe by ſale of the *Nottinghamſhire* eſtate was given her by way of portion. The teſtator was entitled to the reverſion of that eſtate after the death of the duke of *Newcaſtle*, and deviſed it to truſtees to be ſold for the benefit of his daughters, except *L.* whom he declares he had provided for with a portion, and if any of them died, it was to go over to the other daughters; ſo that it appears to be intended by way of portion." As to the conſideration, whether the advancement was a ſatisfaction of one third of the perſonal eſtate, given *G.* by the will, his lordſhip declined entering into the queſtion, as it was not probable there would be any ſurplus after payment of debts. And as to the reſidue of the real eſtate, his lordſhip thought that the teſtator meant to conſider his daughters as his heirs at law, and diſpoſed of the reſidue to them as ſuch.

The above rule of ademption or ſatisfaction being merely preſumptive, *parol evidence* will be received to rebut or repel the implied concluſion. Accordingly in a caſe where —

(*e*) *A.* brought a bill againſt the executors of *J.* for a legacy of 1000l. The will was dated in May, 1738, ſoon after which, *S.* the plaintiff's late huſband, made his addreſſes to her, and in *July* following, applied to the teſtator, who was her uncle, for his approbation. He gave his conſent, and added, that he would give him 500l. but as it was not then convenient to advance the money, he would draw a note payable to him on the 25th of *March*, 1739, and lodge it in *H.*'s hands to be delivered to *S.* after the marriage, which he did accordingly,

(*d*) *Supra*. (*e*) Shudald *v.* Jekyll, 2 Atk. 516.

He alſo ſaid that he would leave ſomething to his niece by his will, but that he would not be conſidered as under any obligation to do it. The marriage did not take place till after the death of the teſtator. The queſtion was, whether the legacy of 1000l. was not adeemed by the ſubſequent advancement of 500l.? And lord *Hardwicke*, C. reſolved the point into two queſtions.—Firſt, whether there was a preſumption of ſatisfaction, or an ademption of the legacy, by what the teſtator did in his lifetime? And ſecondly, if there was not a general preſumption, whether there was any thing in the cauſe which amounted to a proof, that he intended it as a ſatisfaction? This, ſaid his lordſhip, muſt depend upon the note, *and the evidence.*" The teſtator, by his will, has given to the plaintiff, by the name of *E. P.* and to *A. P.* her ſiſter, a general legacy of 1000l. a piece. About ten weeks afterwards Mr. *S.* acquaints the teſtator with his intention of marrying the plaintiff, who approved of the match, and immediately drew a note for 500l. payable to *S.* the 25th of *March* next. After this converſation, and the giving of the note, it appears to have been the intention of the parties to have married in a fortnight or three weeks at fartheſt. The queſtion is, if there be any preſumption to be drawn from hence. I am of opinion that if the caſe reſted here, it would not create a preſumption of ſatisfaction, either of the whole 1000l. or part of it. The general run of caſes is, upon a father's making proviſion, by way of portion, for a daughter in his lifetime. This is truly ſaid to be a debt of nature from a parent to a child, and though he gives a legacy generally under a will, yet he muſt be underſtood to mean it as a portion, and therefore if he give a ſum afterwards to her upon marriage, it is for the ſame end, and conſequently an ademption of the legacy. This court, to be ſure, leans ſtrongly againſt double portions, or double proviſions, and whether the portion given in the lifetime be leſs, or not, is no ways material; but all theſe caſes differ extremely from a bounty given by a remote relation, though I will not ſay, but there may be caſes, between collateral relations, which would be conſidered as an ademption; for ſuppoſe a child to be an orphan, without father or mother, under the care of a collateral relation, who by will gives her a legacy, and expreſſes it to be for her portion, and afterwards makes a proviſion for her in his lifetime, I ſhould be inclined to think this an ademption. But in the preſent caſe, the plaintiff's father is living; and a collateral relation, her *great uncle*, gives her a general legacy. Now I do not know any caſe, where ſuch a relation's giving a general legacy, and afterwards advancing the ſame perſon in his lifetime, has been held to be a ſatisfaction, and therefore, it differs from the caſes of

fathers, or grandfathers ſtanding *in loco parentis.* The chief ſtrength of this caſe depends upon the ſecond queſtion, whether from the proofs which have been read, it appears that the teſtator intended the advancement as a ſatisfaction? I am of opinion that the evidence imports quite the contrary, and *parol declarations have been conſtantly admitted in all theſe caſes* (*f*). The teſtator ſaying to *S.* that he would leave the plaintiff ſomething, but that he would not lay himſelf under an obligation to do ſo, for ſhe muſt take her chance, imports, that he intended to give her a legacy by the will. But how is it poſſible for a court of juſtice to ſettle what was the *quantum* the teſtator intended, and can I imply that he intended to leave her no more than 500l. Suppoſe, even in the caſe of a father, he had given 500l. to a daughter, or to the huſband as a portion, and had ſaid at the ſame time, I will leave her ſomething by my will, but will not lay myſelf under any obligation, and you muſt take the chance, a court of equity would not have held this to be an ademption of the legacy under the will. But it is ſaid, the conſtruction in this caſe muſt be by analogy to what the teſtator has done with regard to another great niece *M. H.* But though he has altered his will as to one perſon, I can never take it to be an evidence of his intention to alter the legacy of another perſon, and therefore the inference to be drawn hence, makes rather for, than againſt the plaintiff." The decree conſequently was, that the legacy was not adeemed.—Again —

(*g*) *A.* by his will bequeathed to his putative daughter, in the following terms. "I bequeath the mortgage bond 1365l. due to me from *Mrs. N.* to miſs *K. M.* now in my houſe, in order to fit her out for *India*, or to diſpoſe of her in marriage." *K. M.* married *B.* who afterwards became a bankrupt, during the teſtator's life; and on the occaſion of the marriage the teſtator gave *B.* a bond for 1000l. as a marriage portion. He alſo gave *K. M.* and her huſband, after their marriage, 600l. to buy furniture, &c. The bond was afterwards paid, 400l. of it being retained by the huſband out of money received on account of the teſtator, and the remaining 600l. upon ſuit, by the aſſignees. The bankrupt's father being examined as a witneſs in the cauſe, ſaid, that the teſtator, before the marriage, told him in a converſation on the ſubject, that "*he could only give K. M. 1000l. upon her marriage, but there would be more hereafter, as his life was a bad one,*" by which he underſtood, that *K. M.* would have an additional fortune at the

(*f*) Roſewell *v.* Bennett, 3 Atk. 77. Pile *v.* Pile, 1 Ch. Rep. 199. Chapman *v.* Salt, 2 Vern. 646. and Maſcal *v.* Maſcal, 1 Vef. 323. S. P. (*g*) Debeze *v.* Mann, 2 Bro. CC. 165.

teſtator's death. The queſtion was, whether the advancement upon *K. M.*'s marriage was an ademption of the legacy? And lord *Thurlow*, C. thus expreſſed himſelf.—"Indeed, I think, that when a man gives a legacy for a particular purpoſe, and afterwards advances money for the ſame purpoſe, it is too late, now, to ſay it is not a preſumption that he meant to execute it, yet it is a preſumption which often overturns the intention of the party. But in this caſe the evidence repels any preſumption of that kind. He makes an apology for the ſmallneſs of the fortune he advanced with her, and ſays that he meant to give her more. He certainly did not mean to give her leſs than 1,300l. and it does not appear, that he did not intend when his own occaſions ſhould not call for it, to give her a larger ſum. The evidence is ſuch, that the witneſs could not underſtand any thing, but that which he ſwears he did underſtand, that the teſtator meant ſhe ſhould have more after his death. I therefore muſt take it, that the thing which he did was not a full execution of what he intended, and if it was not ſo, it is out of the caſe. The next queſtion is, whether the 600l. was an execution of what he intended to do? It was not given as an advancement, but as a general gift, being after the marriage, but it does not correſpond with the converſation, that after his death, a part of his property would come to her, as one of the objects of his bounty. There is no evidence or preſumption, that the gift of 600l. to two married perſons, was an execution of a teſtamentary gift. The executrix muſt therefore give up the mortgage bond, in order that the money may be recovered and paid, ſubject to inquiries, as to how it ſhall be ſettled with reſpect to the wife." This cauſe was afterwards re-heard, and the decree affirmed (*b*).

It is obvious from the peruſal of the above caſes, that the parol evidence adduced to repel the preſumption of ademption, was ſufficient to ſhew ſatisfactorily that the teſtator at the time he advanced the portion to his child, did not intend by doing ſo, to deprive her of the further proviſion which he had made for her by his will. But it muſt be noticed, that the evidence competent to rebut this rule of law relating to preſumed ſatisfaction or ademption, muſt be clear and indiſputable, for if it amount to no more than mere conjecture or probability, the rule will prevail.

(*i*) *H.* by his will in 1774, gave his real eſtate to his eldeſt ſon, except his copyhold lands and coal-mines, which he directed ſhould be enjoyed by his wife for life, and he gave her the reſidue of his fortune, charging her with the tuition and education of his younger children, and empowering her to

(*b*) Ibid. p. 519. (*i*) Elliſon *v.* Cookſon, 1 Veſ. Jun. CC. 10.

provide for them as ſhe ſhould think proper, and made her ſole executrix. After the execution of the will, upon the ſame paper, and without any new date, were theſe words, "Inſtructions or advice to my wife as to the younger children." In theſe inſtructions he appointed 10,000l. to each of his three ſons for their lives, remainder to their iſſue; and 5000l. to each of his two unmarried daughters, and directed his wife to apply the ſurplus of his fortune, after deducting her own expences, to the purpoſes before mentioned. At the bottom of the page were the words "turn over," and upon the other ſide, "and I alſo add that all the ſavings my wife or I ſhall make, ſhall go to her to be diſpoſed of either in her life or by will, among ſuch of my children as ſhe ſhall think fit." A third daughter who had been married before the date of the will, and had received 5000l. as her portion, was not named in any part of the inſtrument. About two years after the making of the will a treaty of marriage was ſet on foot between *R. Elliſon* and *H. C.* (the latter being one of the above-mentioned daughters of the teſtator) which was principally carried on by a Mr. *Buck*, who had married a daughter of *Elliſon*, ſen. The marriage took place in 1777, and the teſtator gave his daughter 5000l. as her portion. The teſtator died in 1783, without having revoked or altered his will; upon which *R. Elliſon* and his wife brought a bill againſt the teſtator's widow for the legacy, who inſiſted againſt the demand that the advancement of the portion was an ademption of the bequeſt; and the bill was diſmiſſed by Lord *Kenyon*, M. R. (*k*). The plaintiff being diſſatisfied with the decree, brought the cauſe on for re-hearing before the Chancellor. The evidence conſiſted of the depoſitions of *Buck*, and of ſome letters which had paſſed between him and the teſtator upon the ſubject of the marriage, what portion the teſtator would give his daughter, and what *Elliſon*, ſen. would do for his ſon. From *Buck*'s depoſitions it appeared, that the teſtator, in a converſation between him, *Elliſon*, jun. and *Buck*, at *W.* the teſtator's reſidence, agreed to give his daughter 5,000l. as a portion, and ſaid ſhe would have ſomething conſiderably more at his death, equal or nearly equal to what he intended as her portion. That it was alſo agreed that *Elliſon*, ſen. ſhould ſettle 400l. a year upon the iſſue male of the marriage; and he ſwore, that if in the minute, he had made at the time he had mentioned "iſſue" generally, it was a miſtake; for *iſſue male* only were intended.—That *Elliſon*, ſen. alſo ſaid, he would give his ſon his *Lincolnſhire* eſtate, about 600l. a year, at his death; that the teſtator wiſhed to have the whole

(*k*) 2 Bro. CC. 306.

of this eſtate ſettled on *all* the iſſue of the marriage *immediately*, which was refuſed; and *Elliſon* preſſed to have the farther ſum which the teſtator ſaid his daughter ſhould have at his death ſpecified and ſecured, which was refuſed on the other ſide upon the ground, that *Elliſon* might as well truſt the word of the teſtator, as the teſtator truſt his. *Buck* being very anxious to bring about the match, prevailed on *Elliſon* to conſent to it on theſe terms, which he at laſt did very unwillingly. This occaſioned the material letters: the firſt of which was from *Buck* to the teſtator, as follows;—"I can only ſay in anſwer to the converſation between us, that as Mr. *Elliſon* hopes the proviſion you ſaid you intended to make at your deceaſe for your daughter, will be equal or nearly equal to what you intend to give her at the marriage, he will reſt perfectly ſatisfied with that engagement." The ſecond letter was the anſwer of the teſtator, in which after complaining of the inadequacy of the ſettlement, which he ſays will be very ſcanty, particularly if their iſſue ſhould be daughters, he proceeds thus;—"You muſt miſtake Mr. *Elliſon* jun. the miſtake may ariſe between what may be probable and poſsible. I told him my preſent plan, which will be executed by my wife, if the longer liver. I ſhewed him the yearly account of my iron works, from the ſucceſs of which my moſt material excreſcences will ariſe, to which I refer him for farther explanation if neceſſary. I ſhould be very ſorry that any miſunderſtanding ſhould ariſe, when it may be out of my power to remedy it." Here the correſpondence ended: and upon this evidence the queſtion was, whether the portion was or was not an ademption of the legacy? And by Lord *Thurlow*, C. "When this caſe was firſt opened, I confeſs I thought the judgment was wrong: now it turns upon a nice queſtion of intention, but my preſent opinion is in ſupport of the judgment. The common way of arguing this is to forget intirely the rule of law; namely, that where a legacy is given to a child it is deemed a portion, and therefore carries with it theſe qualities, that it is a deliberate diſtribution among his children, of ſuch portions as he thinks fit. Crediting him for that deliberation, if he advance in life that ſum which he has adjudged to be the due and proper portion for that child, the preſumption of law is, that he has ſatisfied that intent, and conſequently that it is no longer a ground for any farther demand. I lay a ſtreſs upon the words 'preſumption of law,' becauſe in arguing this queſtion it is generally put as a queſtion for a jury, as to what the intention was on the whole tranſlation. The objection to that is, that it is not a preſumption of fact, but a queſtion upon the validity of a preſumption of law, and I cannot ſend that to be tried by a jury. But though it is a preſumption of law,

it is not that kind of concluſive preſumption, againſt which nothing can be ſaid, but a preſumption which the law makes upon the general facts liable to be rebutted by evidence, and the kind of evidence for that is, any demonſtration from the conduct and language of the author of both gifts, that he conſidered the gift by the will as ſtill a ſubſiſting benefit. If that can be proved, the conſequence will be rebutting the preſumption of law, that he meant to adeem: and when ſpeaking of theſe engagements and the other circumſtances, it muſt be remembered that their whole effect is to raiſe evidence of its being in the teſtator's contemplation, that his will remained unſatisfied. Taking it in that point of view, what is the tranſaction? The ſettlements and their relative value, I now conſider as beſide the purpoſe. Much ſtruggle was made by the *Elliſons*, to try whether they could not get more than 5000l. as the fortune the ſon was to have with her; and after preſſing a great deal for a ſpecification and ſecurity, that ſomething more ſhould be added, the converſation was pretty fairly ſtated by *Buck* in a letter written to *Elliſon* the father, to induce him to conclude it upon the terms then in queſtion; for it ſtates that the teſtator would not engage for a particular ſum, and by no means would conſent to ſecure that ſum. I do not believe that his letter to the teſtator was with a view to ſurprize, but it was ſtretched a little, in the manner of putting it to him; for he tells him the anſwer of *Elliſon* is 'as he hopes, the proviſion you ſaid you intended to make at your deceaſe for your daughter, will be equal or nearly equal to what you intend to give at her marriage, he will reſt perfectly ſatisfied with your word' now to talk of repoſing their ſatisfaction upon the word ſuppoſed to be given is, I do not ſay deſignedly, going a little beyond the point of the converſation, for it was laying the man charged with the expreſſion, under a promiſe. It became therefore very expedient for the teſtator to go into a farther explanation. It is truly ſaid for the plaintiff, that the farther explanation muſt be taken with the letter which occaſioned it, for it does not contradict the letter *in toto*, it ſays nothing as to the ſum being equal or nearly ſo to what he would give as a portion: it leaves that not contradicted, and as to that therefore it muſt be admitted. The miſtake he mentions muſt mean as to his *engagement*, that the ſum ſhall be equal or nearly equal. The words "probable and poſſible" are I know a common expreſſion in *Scotland*. By that he meant to give an idea, that it was probable and poſſible, that it would be equal or nearly ſo. If he had left it there, I ſhould have thought, it would have carried the whole, becauſe it would have wanted a more diſtinct explanation, than that general phraſe would have given it. Not to give thoſe hopes, he re-

fers to the converſation, and that turned upon a plan to be executed by the wife. What was that plan? When I firſt read it, I conceived, that conſidering the laſt words in the will itſelf, and the phraſe of the codicils (though they are not ſtrictly codicils, I will call them ſo) the whole codicil muſt have been in his contemplation. In fact, it would have then been an inaccurate expreſſion, for the codicil goes to leave 40,000l. out of the diſtribution of the wife. But to ſhew that inaccuracy was not his meaning, he has gone farther by ſpeaking of the iron-works, from the ſucceſs of which, he ſays, his moſt material excreſcences will ariſe, and refers him to an account of them. He by his letter charges *Elliſon* with being in poſſeſſion of his real mind, and that it was turning upon that part of the plan, to be left in the execution of his wife, and that plan turning in itſelf upon the excreſcences from thoſe works. In the codicil he ſays, that what ſavings he or his wife ſhall make, ſhall be diſpoſed of among ſuch of the children as ſhe ſhall think fit, either in her life or by will. This, therefore, compared with the phraſe there uſed, and to which he refers, as having been told to him, muſt be deemed to be a true explanation of the idea upon which the converſation proceeded, and conſequently of the extent of the hope, he held out of what more ſhe would have. My opinion is, that if this doctrine of the civil law, regulated as it is, by the deciſions of our courts, had never exiſted, and if now the queſtion was, whether according to the genius and ſimplicity of the law of *England*, all effectual inſtruments a man leaves behind him ſhould take effect, according to the import, it would be wiſer that courts ſhould not buſy themſelves to rebut them by evidence, and that neither the preſumption on the one hand, nor the rebutter of it upon the other, had been ever a part of the law of *England*. But I am not at liberty to turn out a rule of ſo long ſtanding, and introduced by men much wiſer than I can pretend to be. I muſt therefore admit the preſumption. When I have ſtated my doubt about the preſumption, I do not know that this is a caſe which would have afforded the beſt materials to raiſe that doubt to the higheſt point. For though I do not ſay, that the teſtator was appriſed of the preſumption, yet the law intends that he did know it, as it intends every man to know its rules; and this removes all diſputes about the length of time. But I think here it is rather probable that he had heard of the rule, as he might by accident, or elſe he would have ſtruck the legacy out of the will. There is reaſon to imagine, that the decree given in this caſe falls in with the intention of the teſtator, though that does not always happen. All the obſervations muſt turn upon the effect of rebutting the preſumption, and not upon the validity of the preſumption itſelf. He had three ſons,

and three daughters. One daughter was married before the will, to her he had given 5000l. It appears upon the will, that inſtead of giving 45,000l, which, if he had been to provide for the three daughters, as well as the ſons, he would have done, he has only given 40,000l. It appears that he had it in his hopes to raiſe another ſum. It ſeems to be agreed on all hands, that he left about 90,000l. or 100,000l. It appears that he determined to fix pretty nearly a moiety among the children, and to leave another moiety to be diſpoſed of by his wife, in order to keep the children obedient to her. By the converſations he held with *Elliſon* and *Buck*, he ſeems to have hoped, that that would be divided in much the ſame *ratio*, as that in which he had himſelf divided the other: for the conſequence would be, that this child would have a ſum equal or nearly equal to that he had advanced. Theſe words, as they ſtand, cannot be thrown by, when it is a queſtion of rebutting the preſumption, for the words 'equal or nearly equal' ſhew the hope of an uncertainty. To deſcribe a certainty, this would not be accurate, and it is more probable, that he did mean to ſpeak of a thing which was to depend upon chance and hazard to be defined. The anſwer in his own letter has explained what his mind was turning upon, for he was referring to a probable event, and it has turned out exactly according to the deſcription, for it would be enough to give her as much more, or nearly ſo. Now the ſingle queſtion being, whether the teſtator had expreſſed that it was in his contemplation that the proviſion in the will ſhould be a ſubſiſting one, notwithſtanding the portion he had given; and with ſufficient particularity: I muſt pronounce that this notion of a ſubſiſting bounty was confined to that part, which he hoped would be tranſmitted to her through his wife. In ſaying this, it is obvious that what I have often repeated during the courſe of this cauſe muſt be true, namely, *that if he had referred generally to the will, it would have carried this legacy:* for when I am obliged to find in his expreſſions particularity enough to tie it up, I muſt admit, that if he had referred generally to what ſhe would have had by the will, the extent of that reference would be evidence to the whole of the will. If he had ſaid, 'ſhe is the object of my bounty, and therefore greater expectations may be formed upon that circumſtance,' I ſhould have ſaid, that whatever the will appointed to her, ſhe ſhould have had by virtue of that general reference. But this under the terms uſed, and by the preſumption, may be confined to thoſe expectations ſhe derived under the will, without being extended to the reſt; and in this inſtance, I believe, the preſumption has co-incided with the intent. In giving an opinion of this kind, I found myſelf on a belief, that the huſband muſt have had great confidence in his

wife, before this truſt was committed to her, and perfectly expected, that none of his children, and particularly not one of whom he ſeemed to be fond, ſhould be treated more harſhly than the reſt without great miſconduct, and therefore that lady will I dare ſay conſider, that this ſuit will not abſolve her conſcience from performing her huſband's wiſh, and his intention ſeems pretty clearly proved: this letter proves pretty well, that the huſband thought he had ſome way or other ſecured out of the reſidue, a proviſion for her at leaſt equal to that he had given her out of the fixed part. The defendant I dare ſay, will not mind this bill being filed for there can be no doubt about the intention." Decree affirmed; Again,

(*l*) *A.* by his will dated at *Calcutta*, in January, 1790, gave 5000l. to truſtees, in truſt, to pay the intereſt to his natural daughter *J. R.* ſo long as ſhe continued ſole, and the principal if married at his death, or upon her marriage, for her ſole uſe and benefit: but if ſhe died unmarried, then the 5000l. was to revert to his eſtate, and he gave his reſiduary property both real and perſonal to his nephew and three nieces equally. The teſtator afterwards came to *England*, and by a ſettlement dated in *December*, 1794, and made in contemplation of the marriage of *J. R.* with *W. T.* reciting that the teſtator had agreed to advance to *W. T.* 2000l. immediately upon the marriage, in part of *J. R.*'s portion, and to ſecure by his bond the further ſum of 5000l. to *W. T.* payable within twelve months after his the teſtator's death, with intereſt from the period of his death, which principal money and intereſt, together with an equal ſum and intereſt in like manner agreed to be ſecured and paid by the ſaid *W. T.* were ſo ſettled that *J. R.* was entitled to receive the intereſt of the 5000l. ſecured by the teſtator's bond for life, to her ſeparate uſe, and after her death it was limited to her intended huſband for life, and if ſhe happened to be the ſurvivor ſhe was to receive the intereſt of the 5000l. ſecured upon his bond. And after the death of both, the two principal ſums of 5000l. and 5000l. were to be divided among the children of the marriage as therein directed; but if there ſhould be no child, or if any, all of them ſhould die before 21, or marriage, the truſtees were to aſſign the money ſecured on the bond of each obligor, according to his appointment. The marriage took place and the teſtator paid *W. T.* 500l. in part of the 2000l. but the remainder of that ſum, together with the 5000l. upon the teſtator's bond, was due at the teſtator's death, the former to *W. T.* the latter to the truſtees. The queſtion was, whether the legacy of 5000l. to *J. R.* was adeemed by the portion advanced for her benefit upon her

(*l*) Trimmer *v.* Bayne, 7 Veſ. Jun. 508.

marriage? The plaintiffs went into parol evidence, to rebut the presumption: the material parts consisting of the depositions of a Mrs. *Brown*, stating conversations with the testator in the month of *August*, preceding the date of the settlement; the effect of which was, that the witness being informed by him of the intended marriage of his daughter, asked him what fortune he intended to give her. He told her 5000l. and being pressed to give more, said "she is in my will," intimating, when pressed to give the whole immediately, that he was only worth 10,000l. Lord *Eldon*, C. "I do not hesitate upon this particular species of case, to say, I give my opinion without a hope, that any decision will afford satisfaction to every one who looks at the circumstances; and in a case of parol evidence, upon which it is not possible to hope, that the minds of all should concur. It appears that different judges have formed very different opinions upon the nature of the rule in this court. It is obvious that Lord *Thurlow*, if it had been *res integra*, would have disapproved the establishment of it; and Lord *Kenyon* in *Ellison* v. *Cookson*, thought it a very wholesome rule. Many observations occur upon similar presumptions in the case of executor and next of kin; and Mr. Justice *Buller* went the length of intimating, that if he had sat here longer, he would have driven out parol evidence. I say nothing of the nature of any of these rules. It is clearly decided, that there is such a presumption. It is also clearly established, that parol evidence is admissible to rebut the presumption, and my business is dryly to determine, whether the parol evidence in this case has sufficient weight and power to overthrow the presumption, which it is admitted, must *primâ facie* be applied. It is not the habit of this court to direct an issue, either upon a case of this kind or such as *Nourse* v. *Finch*, (1 Ves. Jun. 344): but the rule is settled, that where a parent, or a person in *loco parentis*, gives a legacy as a portion, and afterwards upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume, that he meant to satisfy the one by the other. It differs from the performance or satisfaction of a covenant in this; that the court overlooks small differences in the circumstances of that, which is proposed to be given, and that, in satisfaction of which it is contended to be given. The court does not inquire, whether the portion by the will is intirely and absolutely to the child, or what is afterwards advanced in this form, a settlement upon marriage; which not being a performance of a covenant or satisfaction of a debt, yet is presumed a satisfaction of the intended portion. Under the circumstances of this case, I do not conceive, that the fact of the limitation of this property upon the marriage, can be

ſuch a difference with regard to what was intended by the will and advancement under the marriage contract, ſo as upon that it can be ſaid there is no ademption. In ordinary caſes, without examining whether it would be ſatisfactory to ſay, this court ſhould adopt this rule, if it were *res integra*, I think if you came to the reſolution not to adopt it, you would not ſay ſo in the particular caſe; and it is well worthy of diſcuſſion, whether it ſhould not prevail in this caſe, even if it was not to be ſtated as a general rule; for the legacy is given by the will, with expreſs and peculiar reference to the marriage of the daughter, looking to the fact or the event of marriage: being given as a proviſion for her ſole and ſeparate uſe to truſtees, to be paid upon her marriage; or if ſhe ſhould be married, at his death. Upon the treaty of marriage ſhe had an inchoate title to the portion or fortune to be paid upon her mariage under the will. It cannot be diſputed, that if there was nothing more than the will and the ſettlement, the latter would be an ademption. The execution of it is a fact to be looked at as a fact of evidence. The ſettlement itſelf is very material evidence of the intention of the parties, and of the teſtator, as one party; for it is written evidence, and alſo it is *final* evidence of his intention. But it is ſaid, though upon the gifts provided by the ſettlement, and ſtill more upon the recitals, what is given is to be taken as an advancement of portion, and therefore in ordinary caſes an ademption; yet the evidence is ſo applied to the act done by the teſtator upon the 3d of *December*, 1794, the final act done by him, that under the circumſtances the declarations are ſufficient to controul the admitted effect of the ſettlement in this court. In the caſe of *Elliſon* v. *Cookſon* (*m*), I had a large ſhare. I knew ſome of the parties very intimately, and am perfectly ſure, the caſe was rightly decided. But it was decided upon grounds of imputation as to what the teſtator thought, meant and knew as to the rules of law, which he could not underſtand, even as to the terms in which they are expreſſed. It was impoſſible to talk to the family upon the ſubject, in terms which they could underſtand. *Debeze* v. *Mann* (*n*), was a much more ſimple caſe, upon this ground, that the father of one of the parties, talking to the father of the other, upon the ſubject of the marriage, uſed an expreſſion, from which Lord *Thurlow* concluded, and it is clear he acted upon the idea, that the perſon uſing it, ſtated to the other in that converſation, that what he then meant to advance would not be all; and connecting the future advance with his death, by the expreſſion uſed about his life, as an advance at that time, the principle of that deciſion appears, that the advancement

(*m*) *Supra.* (*n*) *Supra.*

of the 600l. together with the other ſum advanced upon the marriage, would not within the meaning of that converſation ſatisfy what was given by the will, viz. the 1,365l. which therefore was not adeemed. The caſe of *Elliſon* v. *Coökſon*, turned entirely upon this; and it ſhews the danger of this kind of parol evidence. *Buck*, a lawyer, and a very accurate man, clearly miſunderſtood old *Cookſon*, and if that letter had not been written, *Elliſon* would have got both. But *Cookſon* being alarmed at hearing the import of the converſation, writes to ſhew that was not his meaning. I knew every branch of the family, and it was his determined purpoſe, that if his wife ſurvived, the younger children ſhould depend upon her, and not upon him. Therefore, he ſaid, he meant it ſhould fail, if his wife ſhould ſurvive him, and ſhould not think proper to continue it. Lord *Thurlow*, under thoſe circumſtances, thought it altogether in the power of the widow. The principle is the ſame as that in *Debeze* v. *Mann*, in regard to parol declarations. To take it in the caſe where the executor is a truſtee for the next of kin. I fear there is no poſſibility of ſaying parol declarations both previous and ſubſequent are not admiſſible, though Lord *Coke* would have hardly been brought to let them in, as well as declarations at the time. But there is a very great difference, as alſo upon thoſe marriage treaties, upon the point, whether they are all alike weighty and efficacious. A declaration at the time of making the will, is of more conſequence than one afterwards, and a declaration after the will, as to what he had done, I am ſpeaking as to the time merely, is intitled to more credit, than one before the will, as to what he intended to do; for that intention may very well be altered: but he knows what he has done, and is much more likely to ſpeak correctly as to that, than as to what he propoſes to do, though theſe parol declarations are alike admiſſible: whether conſiſting of converſation with people, who have nothing to do with it, people making impertinent inquiries, and drawing from him angry anſwers, or in whatever form, they are all evidence. But they are intitled to very different credit and weight, according to the time and circumſtances. In *Debeze* v. *Mann*, the converſation between the two fathers upon the ſubject of the very contract, between two perſons under a parental obligation to provide rationally for the intereſts of their children, upon every ground, is entitled to much more weight than ſome others. So in *Elliſon* v. *Cookſon*, when old *Elliſon* took the trouble to ſend a brother-in-law to the country, to talk upon the ſubject, an authoriſed agent in the treaty; ſpeaking of declarations between him and the principal, to ſettle the terms of the contract of marriage. That evidence has a character, which does not belong to ſuch as

occurs in this case. It does not appear that from the evidence of any man of business, of any person having an interest of affection, piety, or any other kind, what hope was held out to *W. T.* other than by the instrument, as to what was to be the fortune. It does not appear that *W. T.* ever heard, this conversation with Mrs. *Brown* had passed. It was not therefore had among parties having any sort of interest. I do not say by any means, that therefore it is not evidence. It does not appear by any declaration of the testator, that he was anxious Mrs. *Brown* should know any thing more than that a marriage was intended, or that unless she had provoked the conversation about the fortune, she would have heard a word about it. His answer to her question was neither true according to the will or the settlement, in the sense in which she understood it. It is clear, she understood it a ready money advance, and it is clear from the conversation, the testator must have been satisfied that he misled her, and that he meant to delude her; and this shews the danger from declarations made, perhaps with that view, and sometimes necessary to keep peace in families with persons having expectations. He gives very large bequests by his will, and yet, there he insinuates, that 10,000l. is his whole fortune. So he again endeavours to baffle this curiosity. That she understood it is very clear, from her answer. It is clear, he must have known that he was baffling the inquiry. To keep her quiet, he says 'she is in my will,' that is, for part or the whole of that 10,000l.' He intimates at the end, that he meant to keep part of the 10,000l. in his power. What had passed in the treaty in the mean time between any of the parties, principal, agent, or interested as husband or wife, does not at all appear. She attacks him again upon it at *T.* and he makes the same sort of answer. It is clear upon her evidence, she had no idea he was to advance more than 5000l. at that time. She does not intimate beyond that. Taking it at the highest as to his intention, her understanding was, that he was to advance 5000l. upon the marriage, and that she was in his will; and that declaration would be evidence, provided you believe from the whole character of the conversation, that he was serious in talking to her, which for the purpose of this cause I will believe; and if the settlement had been 5000l. and with this will, upon the authorities she might have had a farther demand. According to the conversation, *J. R.* was to have 5000l. immediately, and 5000l. more at her father's death. If under the contract, infusing the effect of the will and the conversation into the case, 2000l. was advanced, there was 5000l. at his death under the settlement, and if there was no satisfaction, 5000l. under the will, or as it has been contended for the plaintiff 3000l. I am clearly of

opinion, that it must be the 5000l. if any thing: and it is not a *pro tanto* ademption. That there was this variation there is no direct evidence. First, how does it stand with the written contract? The legacy is in a more strict sense given as a marriage-portion, than legacies usually are. Then, not merely to try the parol evidence against a mere advance and a covenant, but as against a declaration under the hand and seal of the testator himself, and an agreement upon marriage, which is a representation and act by him denoting his purpose, subsequent to the conversation with Mrs. *Brown*. She presses him to an advance of some ready money, and he makes up his mind to do so. The settlement is a declaration under his own hand, that by the portion he meant the 2000l. and the 5000l. It may be said, it is not inconsistent to add to it by this legacy: but it would be very extraordinary, and is not the natural meaning that 2000l. should then be advanced, and 5000l. after his death, upon these trusts, and another sum of 5000l. or 3000l. should be paid to her upon his death, for her separate use. That must necessarily be done upon Mrs. *Brown*'s evidence. It is said for the plaintiff, it is clear, that at the time of the conversation, he was not aware of this rule of law, or if he was, he did not intend it should operate. Then you must take the conversation to be a *bonâ fide* declaration of his real intention, which is a great deal. But beyond that, it does not necessarily follow by any means, that if he meant to advance 5000l. in August, and leave a demand under the will, therefore in December he meant to advance 2000l. in money, and agree to advance 5000l. and then leave her her chance under the will. To get rid of the settlement as adeeming the legacy, there must be some declaration as to the effect of the settlement; and I cannot infer, that because in August he did not understand the rule, or did not intend it should have its natural effect, therefore, having afterwards substituted a different provision, he was uninformed of the rule, or meant it should not apply to the legacy. I must suppose, unless the contrary is proved, that when he did the act, he did understand the legal effect of it, and then proof, that at a prior time, he did not know it, or meant that a different provision was not to have such effect, will not avoid the legal effects of it. That satisfies me, that it is impossible that the plaintiffs can have more than 5000l. for if the ademption depend upon the circumstance that he knew the rule, and meant it should take place, the argument for the 3000l. must be upon this, that he knew the 2000l. would adeem 2000l. of the legacy, and knowing that he left it to adeem so much. But he could not know that at that time, without also knowing that the advance of 5000l. would adeem the whole. I must take him to be ignorant of the rule altogether, or know it

throughout. Upon the whole this evidence is not so connected with the act in December, 1794, as to destroy the effect of that act, operating as an ademption to this legacy; and it would be extremely dangerous, however the evidence must be allowed as admissible, to say, such evidence is sufficient to prevent the operation of a clear settled rule of law; if it be not clear and satisfactory to that point, to which it must be, to rebut the presumption, according to the clear settled rule, arising out of the effect of the settlement."

In the case of *Farnham* v. *Phillips* (*o*), Lord *Hardwicke*, C. would not allow parol evidence to be read, to rebut the presumption of satisfaction under an idea, that it would be permitting the will to be explained, by extrinsic matter. It appears however to be perfectly settled by the authorities above stated, and the cases referred to in them, that such evidence is admissible in all those instances.

The principle of this rule of ademption or satisfaction has been much disapproved of by courts of equity, as often defeating the intention of testators. The rule, indeed, is not of their own creating, but was borrowed from the *civil* law. The reasons assigned in support of it are not satisfactory, for when a man is disposing of his property by testament, he does so with a view to the period of his death; but when he disposes of it by present gift, he does so with regard to his life; so that he may be allowed with propriety to be more liberal in the one case, than in the other, and to intend a farther bounty to the person advanced, when his, the donor's life shall determine. Such being the disposition of these courts towards the rule they have laid hold of little circumstances to form cases into exceptions; if therefore the legacy and advancement be *non ejusdem generis*, the latter will be no ademption of the former, as if the bequest were *pecuniary*, and the advancement by *grant of a beneficial lease*. And the reason is, that the court presumes from considering the *different natures of the funds*, that the testator did not intend the advancement to go in satisfaction of the legacy. 5 Ran: 577. Jones or Mason 2 vol. 1 Jones

Thus in a case (*p*) where *A.* bequeathed to *B.* his natural son, a legacy of 10,000l. *A.* during his life, granted to the legatee, a lease of a farm for 99 years, at the annual rent of 40l. which farm was worth to be let at the yearly sum of 180l. the difference between the reserved rent and the real value at 20 years purchase being calculated at 2,800l. The testator also paid the former tenant of the premises, 1200l. for a standing crop, dead stock, and farming utensils, and also 400l. for repairs; making together the sum of 4,400l.—The question

(*o*) 2 Atk. 214. (*p*) Graves *v.* the Earl of Salisbury, 1 Bro. CC. 425.

was whether the 4,400l. advanced by *A.* for *B*'s. benefit, ſhould be conſidered a ſatisfaction of the legacy of 10,000l. *pro tanto?* And the *Chancellor* determined that it ſhould not. The queſtion, however, coming again before the court upon a re-hearing, his lordſhip expreſſed himſelf to the following effect.—"All theſe caſes have been treated as falling within the range of thoſe deciſions, that where a perſon indebted, gives a legacy, it ſhall be conſidered as payment of the debt. I am ſorry the courts have taken it up, on that idea, for when parents are making proviſions for children, they certainly do not conſider it in that light; no law obliges them to make the proviſion in the extent they do. The principle is ſuppoſed to have been founded in the *civil* law: I wiſh the caſes in that law had been originally looked into with more accuracy. I queſtion whether it is there taken up on the idea of a debt, or is not rather conſidered as a preſumption repellable by evidence. The court has, however, certainly preſumed againſt double portions, and although it has encouraged the conjecture with a degree of ſharpneſs I cannot quite reconcile myſelf to, wherever a proviſion is made directly, or as a portion, by a parent or perſon in *loco parentis*, I will not diſplace the rule laid down by wiſer men, that it ſhall be a ſatisfaction, however reluctant I may be to follow it; but I ſhall expect the caſe to be brought up to that point. In the preſent caſe it would be preſuming that *A.* had the idea of a portion in his mind, when he was giving a thing not *ejuſdem generis.*" The firſt deciſion was therefore confirmed.

(*q*) *A.* who was a jeweller, in 1771, bequeathed to his ſon 500l. and 2000l. to four unmarried daughters; he then gave his ſon the utenſils of his trade, which were of trifling value, and bequeathed his reſiduary eſtate to his wife, for life, and after her death he gave additional legacies to his daughters; to ſome 500l. and to others 1000l. and if there was a ſurplus he directed it to be divided among all his children who ſhould be then living. In 1779 he took his ſon into partnerſhip, and by the deed of partnerſhip, the ſtock was to be 3000l. to be brought in, in equal proportions, and to the profits of which they were to be equally intitled. The father brought in the whole capital, and it was underſtood by the whole family, that he meant to give the ſon half of the ſtock. The children who were of age, admitted this by their anſwer, and there was parol evidence of declarations by the teſtator at different times, that he meant to bring his ſon into partnerſhip and to give him half the ſtock; and even the whole, and that he told one witneſs that he had brought his ſon in, and had given him 1,500l. The

(*q*) Holmes *v.* Holmes, 1 Bro. CC. 555.

queſtion made in the cauſe, was, whether this advancement was a ſatisfaction of the legacy of 500l.? and it was held to be no ſatisfaction, not being *ejuſdem generis*, and that it muſt have been the teſtator's intention, that the plaintiff ſhould have both. Lord Commiſſioner *Hotham* relied on an argument for the plaintiff, that if the legacy had been a moiety of the ſtock; and afterwards 500l. had been given, it could not have been a ſatisfaction.

Upon ſimilar inference of intention, if the legacy and advancement depend upon *different contingencies*, the former will not be adeemed by the latter.

(*r*) *A.* bequeathed 1000l. a piece to *B.* and *C.* to be paid at their ages of 21, and if either of them died before 21, then he gave the whole to the ſurvivor.—*A.* afterwards entered into two bonds, the one to *B.* and the other to *C.* in the penalty of 4000l. each, for ſecuring 2000l. a piece to *B.* and *C. provided they ſhould marry in his life-time, with his conſent, or in caſe they ſhould ſurvive him.* There was alſo a recital, that *A.* was deſirous to make proviſion for the maintenance of the obligees. Upon a queſtion whether the bonds were to be conſidered as given in ſatisfaction of the legacies, Lord *Hardwicke* determined in the negative, upon the principle, that the money ſecured by the two bonds, depended upon contingencies which might never happen, and therefore could never be intended by the teſtator to go in ſatisfaction of the legacies, which were ſubject to no contingencies.

If the bequeſt and ſubſequent advancement be made by *ſtrangers* or by diſtant collateral relations, not ſtanding *in loco parentum*, and no intention appears in favour of an ademption, ſuch advancement will not deſtroy the legacy, for as there is no obligation upon ſuch perſons to provide for the legatees, no inference ariſes, that they intended by a ſubſequent gift or advancement, to perform any ſuch obligation *in preſenti*, which they had provided for by will after their deceaſe.

(*s*) *A.* bequeathed to *H. C. S.* the ſum of 6000l. payable in three months after his death, and by a codicil in 1783, he gave to his niece *H. R.* who was not born at the making of the will, 5000l. After the date of the will, viz. in June, 1776, *H. C. S.* (the defendant Mrs. *Comyn*,) married the Rev. *T. C.* the marriage being previouſly approved of by the teſtator, who agreed to give 5,250l. as a marriage portion with her, and upon the 8th of *June*, 1776, he paid to *T. C.* 250l. and made an entry in his ledger, "*June* 8th, 1776, Miſs *H. C. S.* to paid *T. C.* in part of portion carried to *folio* 106, 250l." By indenture of the 25th of *June*, 1776, made prior to and incontempla-

(*r*) Spinks *v.* Robins, 2 Atk. 491. (*s*) Powel *v.* Cleaver, 2 Brown, CC. 500. See alſo Shudal *v.* Jekyll, *ſuprà*. S. P.

tion of the marriage, the teſtator declared that he would ſtand poſſeſſed of an annuity of 100l. (part of an annuity of 200l. to which he was intitled during the lives of *H. C. S.* and *A. R.*) for the ſeparate uſe of *H. C. S.* during the marriage, and afterwards during the remainder of her life, if ſhe ſurvived her huſband, and he alſo transferred into the names of the truſtees in the marriage ſettlement 5000l. 3 per cent. bank annuities, upon the truſts therein mentioned, for the benefit of *H. C. S.* and her huſband, and their iſſue, and in default of iſſue, as ſhe ſhould appoint, and in default of appointment for her heirs, executors, and adminiſtrators, and the teſtator made entries of theſe tranſactions in his ledger, in his own hand-writing, "to *H. C. S.* in part of fortune, an annuity of 100l. *per annum*, value 1000l. To ditto, in full of ditto, 5000l. annuities, conſols 3 *per cent.* valued to her at 80l. to her father at 84l. 4000l." In 1782, the teſtator laid out 800l. in the purchaſe of a chaplainſhip of *Chelſea Hoſpital*, and made entries of it in his caſh-book and ledger.—"1782, *April* 25, by fees on *T. C.*'s commiſſion as chaplain, 3l. 16s.—By Mr. *Jago*, paid Mr. *P.* for chaplainſhip of *Chelſea Hoſpital*, 800l." Theſe ſums of 250l. 1000l. 4000l. and 800l. making 6,050l. the plaintiffs charged, were the whole proviſion the teſtator meant to make for *H. C. S.* and were in lieu of the legacy of 6000l. And one of the queſtions in the cauſe, was, whether the legacy of 6000l. was not adeemed by the ſubſequent advancements? and by Lord *Thurlow*, C. "My opinion will require a few words only.—*A.* by his will, in 1775, gave to *H. C. S.* a legacy of 6000l. this legacy was not mentioned as being a portion. Afterwards, on her marriage, 5000l. in the funds, ſtated in the ſettlement to be her portion, were advanced. It is in evidence that that ſum was advanced by *A.* It is ſtated in the ſettlement to be her portion. He alſo conveyed an annuity to her uſe: there are entries in the books of *A.* by which it appears, that he had made a calculation of the ſums advanced as a portion. In 1783, he made a codicil to his will, by which 5000l. were given to a niece unborn, at the time of making the will. The queſtion is, whether the advancement of 5000l. on the marriage of *H. C. S.* is an ademption *in toto*, or *in part* of the legacy? a legacy *primâ facie*, is preſumed to be a bounty to the legatee, and muſt ſtand as ſuch *donec probetur in contrarium.* The word "portion," although applied in the caſe of a parent, ſhall not be ſo applied to the gifts of other relations or friends: it has been determined not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent ſhall not be a further gift, it is not now to be diſputed; but it is obvious, that the intention of teſtators are as often diſappointed as ſerved by it. Thoſe caſes

ſtand upon their own ground. This caſe is an attempt to make a friend's legacy ſatisfied by a ſubſequent advancement. There are caſes where a man may deſcribe himſelf ſo, that the gift by the will, and that in his life-time may be intended for the ſame purpoſe, but it muſt appear that he meant to put himſelf *in loco parentis*, for there are no caſes, where it has been ſo held, if the ſecond gift appeared to be *diverſo intuitu*. I have gone through all the caſes, and it appears to be the reſult of them, 'that where a ſtranger gives a legacy by will, and afterwards gives a ſum without any evidence that it is intended for the ſame purpoſe, it is not taken as a ſatisfaction, to make it ſo, it muſt appear at the time of the gift to be meant as an ademption of the legacy.'"

If the legacy and advancement be given for *different purpoſes*, as if the legacy were general, and the advancement or proviſion made *in lieu of, or in compenſation for ſome other intereſt*, to which the legatee was intitled, &c. the preſumption of ademption would be repelled; accordingly in a caſe where—

(*t*) *A.* the daughter of *B.* being intitled under the will of her grandfather to a ſixth part of 10,000l. and to a like ſhare of 6000l. under her father's ſettlement. *B.* the father (among other things) bequeathed to *A.* 8114l. 1s. 11d. Bank Stock for life, with remainder to her children and grandchildren; but if ſhe died without leaving ſuch iſſue, he gave the ſame to his other children equally. The will recited the father's marriage ſettlement and declared that the proviſion thereby made for *A.* and his other children, were intended a ſatisfaction of thoſe they were intitled to under his ſettlement. After the date of this will *A.* married *C.* upon which occaſion the teſtator transferred 5000l. in ſtock to her huſband for his own uſe, and it was ſtipulated in the marriage-ſettlement of *A.* and *C.* that they in conſideration of the 5000l. would tranſfer to *B.* all *A.*'s intereſt in the 10,000l. given by the grandfather's will, when ſhe became intitled to it, which was done accordingly. The queſtion was whether the marriage portion given with *A.* by the teſtator was an ademption *pro tanto* of the legacy of 8114l. 1s. 11d. bequeathed to her by his will? and it was determined in the negative. The principle ſeems to have been this, that there was no evidence of an intention in the teſtator to adeem or ſatisfy the legacy by his advancement on *A.*'s marriage, but that a contrary inference was rather to be collected from the circumſtance, that the advancement was given in lieu or recompenſe of another intereſt, viz. that to which *A.* was intitled under her grandfather's will. This was

(*t*) Baugh *v.* Read, 1 Ves. Jun. CC. 257.

ſurely ſufficient to repel the inference that he intended it to go in ſatisfaction of any other intereſt without being ſo expreſſed. Again—

(*u*) *B.* by his will directed his executors to place 1000l. at intereſt, and to apply ſuch intereſt or ſo much of it as they ſhould think neceſſary, for the maintenance and education of his grandſon *S. R.* and he alſo directed his executors to apply all or any part of the 1000l. and intereſt, in binding his grandſon apprentice, or ſetting him up in the world, as they in their diſcretion ſhould think fit, and ſo much thereof as ſhould not be applied for thoſe purpoſes he ordered to be paid or transferred to his grandſon, at his age of 21. But if he died under that age, he bequeathed the ſame to other perſons. By a codicil the teſtator gave legacies to three of his ſervants, whom he had omitted in the will. After the will but before the codicil, the teſtator put his grandſon an apprentice to one *S.* of *L.* haberdaſher, and paid 126l. with him to his maſter. Queſtion whether the advancement by the teſtator of the 126l. was not to be conſidered an ademption *pro tanto* of the 1000l. legacy? And by the *Maſter of the Rolls* "The doubt is, whether I can conſiſtently with the intention of the teſtator, decree the whole 1000l. to *S. R.* A grand-father to be ſure is a very near relation, but ſtrictly ſpeaking does not ſtand *in loco parentis*, a father is indeed obliged to maintain his child, but a grandfather is not obliged to maintain a grandchild. A father can appoint a teſtamentary guardian of his child but a grandfather cannot. The plaintiff's counſel inſiſt, that as the 1000l. was given to bind *S. R.* an apprentice, the teſtator having done ſo himſelf, it is a partial ademption and ought to be taken out of the portion: and they have compared this to the caſe of a perſon's giving *A.* 1000l. by will, to build a houſe, if the teſtator lay out that ſum upon a houſe for *A.* it is a ſatisfaction, and *A.* ſhall not have the 1000l. under the will; and that as *S. R.* in the preſent caſe has had the thing intended, he ſhall not have the legacy. But I think the preſent caſe differs from that which has been cited, becauſe the 1000l. is not given for the putting him out apprentice only, but for *other purpoſes*, maintenance, &c. neither are the executors obliged to expend ſuch ſums as ſhall be neceſſary for apprenticing him, out of the 1000l. but they may do it out of the intereſt and produce of it. Beſides *S. R.* might have choſen ſome other buſineſs, or perhaps none at all. Thoſe caſes therefore, in which ademption has been allowed, muſt be confined to ſuch inſtances, where a teſtator gives a legacy for one particular purpoſe only, and after that, applies a ſum

(*u*) Roome *v.* Roome, 3 Atk. 181.

of money to the ſame purpoſe. It appears alſo manifeſtly by one circumſtance, that the teſtator did not intend there ſhould be an ademption, and that is the codicil, (made above a year after the 126l. has been laid out for apprenticing *S. R.*) which is a confirmation of the legacy and amounts to a republication of the will. If the teſtator had any intention of deducting the 126l. out of the 1000l. he had a fair opportunity of doing it when he was adding a codicil, and as he has not done it, it will be the greateſt equity to decree the whole 1000l. to *S. R.*" which was accordingly done.

If the legacy be of uncertain amount, a ſubſequent advancement will be no ademption, if, therefore, the bequeſt be of a *reſidue*, an after-gift or proviſion will not adeem it. Thus in a caſe where—

(*x*) *A. B.* a freeman of London, having a wife and ſix children, by will gave to his wife her widow's chamber and the third of his eſtate, which ſhe was intitled to by the cuſtom; and to his ſix children one other third, to which they were intitled by the ſame cuſtom; and as to the remaining third, after the deduction of a debt of 100l. which he directed to be paid, he gave the reſidue to his wife and children in equal portions. The teſtator married one of his daughters to the plaintiff after making his will, and gave her 1000l. which in the marriage articles was called her portion or proviſion.—Queſtion, To what extent the bequeſts in the will in favour of this daughter were adeemed by the advancement of the 1000l.? And Lord *Hardwicke*, C. "Where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, ſuch proviſion has always been held an ademption. But there is no caſe where the deviſe has been of a reſidue that is uncertain, and at the time of the teſtator's death may be more or leſs in which a ſubſequent portion given, has been held an ademption, here, this is not a deviſe of one third, but of a reſidue after payment of a debt charged on that third. Here is likewiſe ſomething to which this portion may be properly applied as a ſatisfaction, viz. the orphanage part, and he calls this a portion or proviſion in the marriage articles, which ſeems as if he then conſidered this as an advancement in his life-time, in bar of the cuſtom. There is no declaration in the will that he intended all equal, but what he has ſaid of equality is of the reſidue, which is a part of the eſtate remaining, after what is given away in the teſtator's life-time." His Lordſhip therefore decreed that the plaintiff was intitled to a proportionate ſhare of the reſidue, ſhe admitting to have received her orphanage part in the life of the teſtator. Again—

(*x*) Farnham *v.* Phillips, 2 Atk. 215.

(*y*) *A.* being seised of freehold, copyhold, and leasehold estates, by his will of the 29th August, 1785, after making specific and equal bequests to *T. M.* and *A.* then infants and unmarried, his three natural children, he directed his executors to sell all his estates, and after payment of debts, &c. to lay out the money in the purchase of Long Annuities, to accumulate until *T.* attained 21, when the same was to be paid to *T. M.* and *A.* equally. After the making of this will, the testator upon the marriage of his daughter *A.* with *R.* advanced with her as a marriage portion 1500l. And afterwards upon the marriage of his other daughter *M.* with *G.* he gave with her a portion of 1000l. but never advanced *T.* any thing. The question was, whether the advancements by the testator for *A.* and *M.* were to be considered as ademptions *pro tanto* of their shares of the residue? And by the Lord *Chancellor*, "I cannot draw any conclusion from the case of intestacy, the construction of the law there is, that the children shall all take equally. With respect to this will, the testator having absolute power over the fund, has given it to his children equally; by having before made a provision, he has made no reference to it in the will. It is very difficult to apply the rule to an uncertain residue. It was certainly the opinion of Lord *Hardwicke* in the case in *Ambler* (Watson *v.* the Earl of *Lincoln*, 325) that the uncertainty of the residue made the difference." His Lordship therefore ordered the residue to be equally divided. And in another case—

(*z*) *A.* by his will of 1788, bequeathed the residue of his estate to trustees, in trust (after payment of his debts, funeral expences, the charges of proving his will, and executing the trusts of it; and after payment of a legacy he had before given, and of any legacy that he might give by codicil) for the benefit of his four daughters, or any child that might be born to him and living at his death, or born in due time afterwards, in manner therein mentioned and directed. In *January*, 1797, *E. W.* one of the testator's daughters, married *T. F.* at Naples, where all then resided, with the consent of her father, upon which occasion the testator agreed to give *T. F.* with his daughter, as her portion, so much capital stock in the public funds in *England*, as would produce him a net annual income of 400l. which capital stock and interest it was agreed should be settled upon the husband and wife, and the children of the marriage. After the marriage took place, transfers were made accordingly by the testator, of 10,000l. 4 per cent. Bank Annuites, to *T. F.* and by him to trustees. The Bill was filed by Mr. and Mrs. *F.* to obtain payment of

(*y*) Smith *v.* Strong, 4 Brown, CC. 493. (*z*) Freemantle *v.* Bankes, 5 Ves. Jun. CC. 79.

a fourth part of the reſidue of the teſtator's eſtate under his will, but this demand was reſiſted by the three other daughters of the teſtator, on the ground that the portion advanced with Mrs. *F.* upon her marriage, was an ademption of the bequeſt to her, of her ſhare of the reſidue. But Lord *Loughborough*, C. "The fallacy of the argument is conſidering a gift of a reſidue as a gift of a portion. It never can be ſo conſidered. The idea of a portion *ex vi termini*, is a definite ſum. The teſtator ſpecifies this as part of his property; that is, ſubject to all ſuch debts as he may contract, and ſuch legacies as he may give. Then what remains, which is from its nature indefinite, he gives to his daughters. If it is a queſtion of value, I will give more time to conſider it: but if any one had put the queſtion to me in the abſtract, I ſhould have ſaid it was a ſettled point. So much did I conſider it ſettled, that when you began to ſtate it, it occurred to me as decided, and the very caſe of Mr. *Pelham*'s will occurred to me. The printed report muſt be erroneous, for no doubt, the reſiduary eſtate there was conſiderable. I will make the decree according to the prayer of the bill; but it ſhall reſt in minutes, in caſe upon conſideration you think it deſerves more argument." The decree was drawn up accordingly without farther notice.

As tranſactions between parents and children are, as it ſeems, to be conſidered in a different view from ſuch as take place between ſtrangers, if a legacy were given to *B.* the daughter of *A.* and ſuch legacy became the debt of *A.* as by his having been appointed executor or otherwiſe, and *A.* ſhould afterwards advance *B.* upon marriage, or on ſome other occaſion, with a portion or ſum equal to the debt, ſuch an advancement would be an ademption or ſatisfaction of the debt or legacy.

(*a*) The plaintiff's wife was entitled to the reſidue of her grandmother's eſtate, under her will, and was alſo appointed executrix. Her father was adminiſtrator *durante minore ætate* of his daughter. At the period of her marriage with the plaintiff, he was by agreement to have 800l. from the father, which in the ſettlement was mentioned to be a portion, and in conſideration of natural love and affection. It was inſiſted for the plaintiff, that he was entitled to an account of the reſidue of the grandmother's eſtate, from the repreſentative of the wife's father, and that the 800l. paid by her father upon her marriage, was not in ſatisfaction of this reſidue, eſpecially as it was expreſſed to be given for natural love and affection; and it was alſo contended, that as the father at the time of the marriage, was worth 8000l. at the leaſt, and had only this daughter and

(*a*) Wood *v.* Briant, 2 Atk. 521.

one ſon, it was not probable he meant it as a ſatisfaction—That there was no caſe to be produced, where a father was indebted to a child on account of a demand under the will of a collateral relation, that before the demand was liquidated, his giving a ſum as a portion to this child, had been held to be a ſatisfaction of the demand. The defendant's counſel reſted chiefly upon the parol declarations of the plaintiff and his wife, ſoon after the marriage that the 800l. was intended both as a portion and a ſatisfaction for the reſidue of the grandmother's eſtate, and the depoſitions of ſix or ſeven witneſſes were read, which were very full to this point. To encounter this evidence, proof of the father's declarations before and after the marriage was read for the plaintiff, viz. his ſaying that his mother had left 500l. at leaſt to his daughter; and that he would give the plaintiff 1000l. and make a man of him; and not above ſix weeks before his death, his declaration to the plaintiff "thou knoweſt I owe thee a great deal of money, and thou ſhall not be wronged of a farthing." Lord *Hardwicke*, C. "The plaintiff is intitled of courſe to what remains due upon the 800l. The doubt is, whether there ought to be an account taken of the grandmother's eſtate? I am of opinion there are no grounds to direct ſuch an account. If I was to do it after ſuch a length of time as twenty years, for ſo long the grandmother has been dead, it would be laying down a rule, which muſt create great confuſion. The firſt queſtion is, whether there be a preſumptive ſatisfaction of the legacy to the plaintiff's wife, under the grandmother's will, by the 800l. being advanced to her by the father on her marriage? I do not think any certain rule can be laid down, but the caſes muſt depend upon their particular circumſtances. *There are very few caſes, where a father will not be preſumed to have paid the debt he owes to a daughter, when in his life-time he gives her in marriage a greater ſum than he owed her*, for it is very unnatural to ſuppoſe that he would chuſe to leave himſelf a debtor to her and ſubject to an account. The word "portion" to be ſure, may imply a fortune out of the father's eſtate, but on the other hand, it relates likewiſe to what the wife brings with her in marriage, and anſwers to the word *dos* in Latin, ſo that it is as properly and naturally applied to this ſenſe as the other; and no argument in favour of the plaintiff is to be drawn merely from the term "portion" being made uſe of in the marriage ſettlement. As to the caſe of *Chidley* v. *Lee*, Pre. Ch. 228. The ground Sir *John Trevor* went upon was that the huſband knew nothing of the legacy to the wife from the collateral anceſtor, and therefore held it was not ſatisfied by the portion, though it was a much larger ſum than the legacy: but I muſt own, I think that was an

extreme hard caſe, and I believe I ſhould have been inclined to determine it otherwiſe. If the preſent caſe reſted upon the preſumption only, I ſhould be of opinion that the 800l. was a ſatisfaction for the reſidue under the grandmother's will. It has been ſaid the legacy was unliquidated, and no account has been taken of the grandmother's eſtate to this day; and if there were any grounds to think that the reſidue under her will was more than the fortune given to the plaintiff's wife in marriage, it might be a reaſon for directing an account of this eſtate, but 500l. is admitted to be the utmoſt amount. The evidence on the defendant's ſide, with regard to the declarations of the plaintiff and his wife, are very ſtrong, and apply directly to the point of ſatisfaction; and on the other ſide, there are only looſe and general declarations of the father, that he was indebted to the plaintiff." His Lordſhip, therefore decreed an account of the father's perſonal eſtate as to the 800l. only. Again—

(*b*) Bill by the plaintiff, adminiſtrator to his wife, one of the daughters of *W. B.* which daughter was intitled to a fifth part of a legacy of 520l. left to her and four ſiſters by the will of *T. T.* their grandfather. The caſe was this:—*T. T.* made the wife of *W. B.* executrix. *W. B.* as her huſband, poſſeſſed himſelf of the perſonal eſtate of *T. T.* mixed the aſſets with his own property, applied them in his own buſineſs, and continued ſo until his death. In 1740, there was a treaty for the marriage of the plaintiff with one of *W. B.*'s daughters, upon which *W. B.* was to give 400l. as a marriage portion, as ſworn by the plaintiff's father, one of the parties to the agreement. Upon the wedding-day *W. B.* went up and fetched 400l. which was put by for the huſband's uſe, one witneſs ſwearing that *W. B.* ſaid "there is the money, but that is not all;" another, that he ſaid "there is what I give my daughter, but that is not all;" and both added "or words to that effect." It appeared, that the daughter was privy to the right ſhe had to the fifth part: it did not appear, but rather the contrary, that her huſband knew it at the time, but he became acquainted with it a year after the marriage; yet he never made a demand of it in the life of his wife, who died in 1742, nor in the life of *W. B.* who died in 1746. For the repreſentative of *W. B.* the caſe of *Wood* v. *Briant*, laſt ſtated, was cited—And Sir *John Strange*, M. R. "As the plaintiff knew of this right in his wife, there is no reaſon why he ſhould not have made this demand during the time the father-in-law lived after the death of the wife, inſtead of lying by till after the death of him who was party to the

(*b*) Seed *v.* Bradford, 1 Ves. 501.

tranſaction, and might have given ſome account of it, if called upon. To be ſure in caſes of this nature, there is no occaſion for an expreſs ſtipulation that the 400l. was given in full ſatisfaction of what came to the parent's hands belonging to the child, and that he does not give it abſolutely out of his own pocket. But every caſe of this kind muſt be taken with the circumſtances upon which the court goes, to ſee whether from the nature of the tranſaction and demand, it is not implied, that the money thus given in the lump, included what the father gave by bounty, and alſo what came to his hands as belonging to the child. That is the natural tranſaction, and otherwiſe the court muſt ſuppoſe he intended to give the 400l. out of his own pocket, and ſuffer himſelf and his wife to remain ſtill liable to that demand and intereſt. The caſe cited does not ſeem to differ materially from this; the court there conſidered it as an implied ſatisfaction, though in the tranſaction no notice was taken of it one way or other, it not being natural to imagine he would give 800l. out of his own pocket, and leave himſelf debtor to his child for the produce of the perſonal eſtate come to his hands, for which he was accountable. The preſent caſe is ſtronger, for here is a certain ſum; it is more natural to conſtrue the 400l. an implied ſatisfaction of the 104l. the fifth part of a legacy of 520l. than there the 800l. a ſatisfaction for an unliquidated ſum of 600l. which was only gueſſed at. The only difference is, there the father was adminiſtrator in his own right, here it was in right of the wife, executrix of the perſon who left the legacy: but all theſe effects coming to his hands, and being blended with his own, he muſt be conſidered as the father in that caſe, and as truſtee for the plaintiff's wife. All the other daughters were advanced in the ſame way by portions given by him in his life, and never thought they were intitled to their ſhare of that legacy beſides, although they by their anſwer claim it, if the court ſhould be of that opinion. Their acquieſcence and the plaintiff's is ſtrong evidence it never was ſo underſtood." The bill was therefore diſmiſſed.

CHAP. IV.

Deſcription of Legatees.

IT appears to be now ſettled, that when legacies are given to a deſcript claſs of individuals, payable at a future period, as to the children of *B.* when the youngeſt ſhall attain twenty-one, or, to be divided among them upon the death of *C.* any child who can entitle himſelf under the deſcription, at the time of diſtributing the fund, may claim a part of it, *viz.* as well thoſe children living at the period of diſtribution, though not born till after the teſtator's death, as thoſe born before, and living at the happening of that event. Accordingly, in a caſe, where;—

(*a*) *A.* bequeathed 300l. to *E. P.* to be paid at 21, or marriage, with intereſt for her maintenance and education in the mean time; but if ſhe died before 21 or marriage, then to the younger children of *F. E.* equally. Some of *F. E.*'s younger children being born before, others at the making of the will, and others after the death of *A.* the queſtion was, which of the above claſſes were intitled to ſhares of the legacy? And Lord *Hardwicke*, C. was of opinion, that the legacy being contingent, thoſe who ſhould be younger children at the death of *E. P.* before 21 or marriage, would be entitled to it.

(*b*) *W. A.* by will, deviſed to truſtees, a freehold eſtate upon truſt for his daughter *H.* for life, with remainder to the heirs of her body, and in default of ſuch iſſue, in truſt to ſell, and pay the money in equal portions among the children of his ſiſters *E.* and *M.* when they ſhould attain their ages of 21 years. The teſtator died in April, 1743, leaving his daughter *H.* ſurviving, who died in 1746, unmarried, and without iſſue. At the teſtator's death, *E.* had ſix children living, and *M.* ſeven. *M.* had alſo another child born after the death of the teſtator, which child, as the bill charged, was not *in eſſe*, nor *ventre ſa mere* at the laſt mentioned period; but it was born in the life of the teſtator's daughter *H.* and the *Maſter of the Rolls* declared, that ſuch of the fourteen children of the teſtator's two ſiſters as had attained 21, were each intitled to one fourteenth part of the money, as there were fourteen children

(*a*) Elliſon *v.* Airey, 1 Veſ. 111. (*b*) Bartlett *v.* Holliſter, in a note to Congreve *v.* Congreve, 1 Bro. CC. 530.

of the teſtator's two ſiſters at the death of *H.* and he directed their ſhares to be paid accordingly, and the reſidue to be paid into the bank, with directions that ſuch of the children as were under age, were to be at liberty to apply for their ſeparate ſhares when 21.

(c) *A.* by codicil bequeathed in this manner "I give and bequeath a further ſum of 5000l. ſterling, to purchaſe ſtock, and the intereſt to be paid to my mother M. *Deviſme*, at her death the intereſt to be paid to my brother *William Deviſme*, and at his demiſe, to my godſon *Stephen*; at his deceaſe, if before he be of age, to be divided among his brothers equally." And by another bequeſt, "to my brother *Lewis Deviſme*, 4000l. to buy ſtock, to enjoy the income during life, and in caſe he does not marry and leave children, to revert to my brother *William*'s children in equal parts." The teſtator died 2d *November*, 1770. S. *Deviſme*, the godſon, died an infant, 26th *February*, 1770, before the making of the codicil, leaving *William* and *James* his two brothers, who were is only brothers living at the date of the codicil, and at the teſtator's death. He had alſo two ſiſters, *Elizabeth* and *Sophia*, living at both the laſt mentioned periods, but *Sophia* died in *January*, 1774. *Lewis Deviſme* died in *September*, 1776, unmarried and without iſſue, at which time *William Deviſme* the father, had no children living, except *William*, *James*, and *Elizabeth*. M. *Deviſme* the mother, died in February, 1779, and *William Deviſme*, the father, in *February*, 1781, leaving *William*, *James*, and *Elizabeth*, and another ſon *Andrew Deviſme*, who was born in *October*, 1778, after the teſtator's death, and *after the death of Lewis Deviſme*. The queſtions in the cauſe ſeem to have been, firſt, whether *Andrew Deviſme* was intitled with his brothers to a ſhare of the legacy of 5000l. bequeathed to the brothers of *Stephen Deviſme*, though not born till after the deaths of the teſtator, and of *Stephen?* Secondly, whether *Stephen* and the repreſentative of *Sophia*, *Stephen* not being born till after the death of *Lewis Deviſme*, and *Sophia* having died before him, were intitled to any part of the legacy of 4000l. given to the children of their father *William* upon the death of *Lewis*, without marrying and having iſſue? and Lord *Thurlow*, C. was of opinion, that as *Andrew* was born before the diſtribution of the fund, the diſtribution not being to take place during the life of *William* the father, he was intitled to a ſhare of the 5000l. He alſo declared, that the repreſentative of *Sophia* was intitled to a part of the 4000l. And as no mention is made by his lordſhip of any right of *Andrew* to participate in the laſt named fund, as one of the children of *William*, it ſhould

(c) Deviſme *v.* Mello, 1 Bro. CC. 537.

ſeem that as *Andrew* was not in exiſtence at the death of *Lewis*, when the property was to be divided, his title to a ſhare of it could not be ſupported.

(d) A. having given by her will ſeveral annuities, bequeathed after the death of the annuitants, 50l. a piece to the children of *D.* *D.* had then ſeven children, ſix of whom died in the life of the ſurviving annuitant. *D.* had alſo a daughter born after the teſtatrix's death, but in the life time of the annuitant; one of the queſtions was, whether the daughter born after the death of the teſtatrix, was intitled to the legacy of 50l. and it was determined in her favour.

(e) B. deviſed her real eſtates to truſtees in truſt, to permit her nephew *F.* to receive the rents for life, and after his death to ſell the eſtate and divide the money among all the children of *F.* at their ages of 21. *B.* alſo gave her perſonal eſtate to the ſame truſtees to diſtribute among all the children of her nephew at 21. Queſtion, whether a child of *F.* born after the teſtatrix's death, was intitled to a ſhare of her property bequeathed in truſt for the children of *F.*? and it was decided in the affirmative.

(f) D. bequeathed to the children of his ſiſter *G.* 350l. with intereſt, to be paid to them reſpectively in equal ſhares and proportions as they ſeverally attained 21; and if any of them died under that age, then their ſhares ſhould go to the ſurvivors. At the teſtator's death, *G.* had two children, afterwards another was born during the infancy of the other two, and the court was of opinion, that the youngeſt child being born during the infancy of the two elder, though after the death of the teſtator, might be intitled to a ſhare of the 350l. and intereſt.

(g) E. by his will deviſed the reſidue of the rents, profits, and intereſt of his real and perſonal eſtates in truſt for the maintenance and education of *all* the children of his three daughters, *R. S.* and *D.* equally, until the youngeſt of his ſaid grandchildren ſhould attain 21, and in caſe of the death of any of them before the youngeſt ſhould attain 21, who ſhould have been married, and ſhould have at his or her death a child or children, then he directed that ſuch child or children ſhould be intitled to the ſame ſhare, which their deceaſed parents would have received, if they had lived until the youngeſt of ſuch child or children ſhould have attained 21; *and when ſuch youngeſt child ſhould have attained* 21, the teſtator then gave one full and proportionable ſhare of the capital thereof, to the proper uſe of ſuch his ſaid grand children as ſhould be then living, and the child or children of ſuch as ſhould be dead. *D.* at the teſtator's

(d) Attorney General *v.* Criſpin, 1 Bro. CC. 386. *(e)* Congreve *v.* Congreve, 1 Bro. CC. 530. *(f)* Gilmore *v.* Severn, 1 Bro. CC. 582. *(g)* Hughes *v.* Hughes, 3 Bro. CC. 352—434.

death had six children, and she had afterwards another child; *R.* had only one child at the death of the testator, but had another afterwards; and *S.* had four children at his death, and two more after that time. Question, whether the children born after the testator's death, should be allowed to take equally with those living at that period? And Lord *Thurlow*, C. "when a testator gives all his property to be divided among his children, when they shall attain 21, in so general a manner, the principle of the cases seems to have been that such a general devise shall embrace all the children, and the distribution must accordingly be made among *all*. But where the court has ascertained the time as perfectly marked out by the intention of the testator, it is considered as the period of vesting the property in possession, and consequently when it comes to be distributed, it must be among those only who are *in esse* at that time. Here, however, is a fortune given generally to *all* the children, and there seems to be no expression, which either naturally or impliedly can exclude any of the children from their distributive share, this being a general gift, not narrowed or controlled by any words the testator has used, consequently, the youngest child must take at 21, with the rest."

(*b*) *A.* by his will, in 1763, devised his real and personal estate to trustees, in trust among other things out of the rents, &c. to pay his wife *Margaret* 800l. a year, until his daughters *D.* and *C.* should marry, and after their marriages, 600l. a year for life; and subject thereto, to raise out of the rents and profits, 3000l. as soon as conveniently might be after his death, and to pay 2000l. part thereof to *D.* and the remaining 1000l. to *C.* with a direction for the accumulation of the surplus rents and profits during the wife's life, and after her death, in trust to pay the further sum of 7000l. to his two daughters 3000l. part thereof to *D.* on the day of her marriage, and 4000l. to *C.* on the day of her marriage, provided such marriages should happen after his wife's death; and if either of his daughters married in the life of his wife, her share to be paid within six months after the wife's death, and if both or either of his daughters died unmarried, in trust to pay the share or shares of her or them so dying in the following manner;—2000l. part of the 3000l. *D.*'s share to *all* and every the child and children of his son *R. A.* equally, to be divided between and among them if more than one, but if one only, then to such only child, the daughter's shares to be paid at her or their age or ages of 21, or day or days of marriage; the sons' shares at his or their age or ages of 21, or *to be sooner advanced* for his or their preferment in the world or benefit, if the trustees or the survivors of

(*b*) Andrews *v.* Partington, 3 Bro. CC. 401.

them &c. ſhould think fit, with ſurvivorſhip among the children, and a direction that the intereſt ſhould be paid towards their maintenance and education, till their ſhares became payable, in proportion to their reſpective intereſts in the capital. And the teſtator gave the *reſidue* of his eſtate, (after the death of his wife, and payment of 1000l. to his ſon *R. A.* and three annuities to perſons ſince dead) to the children of *R. A.* in the ſame manner, with the 2000l. given in the firſt place to *D.* The teſtator died in 1763, and his widow in 1774; *D.* never married. *Sarah*, the wife of *R. A.* died in *April*, 1781, leaving twelve children, ſix of whom had attained 21, and the others were minors. Two were born before the will, ſeven afterwards, and in the life of the widow, and three after her death. *R. A.* had alſo three other children who were dead; one born in 1760, who died in 1763; another born in 1769, who died in 1783; and another born in 1776, who died in the ſame year. Queſtion, what children ſhould take under the bequeſt of the reſidue? Firſt, whether all ſuch children as *R. A.* ſhould have at the time of his death? Secondly, whether it ſhould be confined to ſuch as were living at the death of the teſtator's widow? Or, laſtly, whether to ſuch children as were living at the time, the eldeſt child attained 21? And Lord *Thurlow*, C. ſaid, where a time of payment was pointed out, as where a legacy is given to all the children of *A.* when they ſhall attain 21, it was too late to ſay, that the time ſo pointed out ſhall regulate among what children the diſtribution ſhall be made. It muſt be among the children *in eſſe*, at the time the eldeſt attains ſuch age. He ſaid, he had often wondered how it came to be ſo decided, there being no greater inconvenience in the caſe of a deviſe, than in that of a marriage ſettlement, where no one doubted that the ſame expreſſion meant all the children.

(i) A. by his will gave to truſtees 15,000l. for his grandſons, *G. C. T.* and grand-daughters *A.* and *S.* the five children of his ſon *T. P.* and all and every the child and children of his ſon *T. P.* in equal ſhares; the part or ſhares of a ſon or ſons to be aſſigned at his or their reſpective ages of 21 years, and the part or ſhares of a daughter or daughters at their reſpective ages of 21 years, or upon the day or days of her or their marriage, ſo as ſuch marriage be had with the conſent of the parent or guardian. The teſtator directed the legacy to carry intereſt at 4l. *per cent.* from the day of his death, and ſo much of the intereſt of each child's fortune as the truſtees ſhould think abſolutely neceſſary, to be applied for maintenance and education; the reſidue to accumulate for the benefit of ſuch child or children,

(i) Preſcott v. Long, 2 Veſ. Jun. CC. 690.

or such other person or persons as should become intitled under his will to the portion or portions, out of which such bequest should be made, and if any or either of the sons of *T. P.* should die under 21, or any or either of his daughters before 21 or marriage, he directed the portion or portions of such of them so dying, to be held upon the same trusts as were before declared of another legacy. He also directed his executors and trustees to advance such sums of money as they should think proper for putting out all or any of the sons of *T. P.* to any trade or business, or for his or their advancement, preferment, or benefit, at any time before such son or sons should attain 21; not exceeding 500l. each. *G.* having attained the age of 21, filed the bill to have 3000l. paid to him immediately; and that sum was decreed to him accordingly, the period of distribution being when the first legatee attained 21.

(*k*) *A.* after directing a sale of his real and personal estate, the payment of his debts, &c. bequeathed the residue of the money to trustees, to place out at interest, in trust, to apply a sufficient part of such interest for the maintenance and education of all the children of *D. H.* and *M.* his wife, until they severally attained the ages of 16, and to pay and transfer the capital or residue of his estate and effects with the remaining interest and produce equally to and among all the children of *D. H.* and *M.* when they respectively attained their said ages of sixteen: but if one child only should live to attain that age, then to such only child: and if any of the children happened to die under age leaving issue, such issue were to be intitled to their parent's share, so soon as they severally attained their ages of sixteen; and the trustees were directed to pay the interest thereof in the mean time to *D. H.* and *M.* for the maintenance and education of such issue; but if all the children should die under age, and without leaving issue, the testator then gave the residue with the remaining interest and profits to *M.*—*D. H.* and *M.* had nine children, some of whom were born after the eldest attained the age of sixteen; and the question was, whether the children not in existence when the eldest child arrived at sixteen, should be allowed to participate in the bequest with those living at that period? And the court determined that they were not intitled to any share, as they were not living when the fund was to be divided, *viz.* when the eldest child attained his age of sixteen, the *Chancellor* observing, that this case must be added to the others, and was an extremely convenient construction.

(*l*) *B.* by his will, bequeathed as follows:—"I give and bequeath to my well-beloved wife *L. M.* all the interests of my

(*k*) Hoste *v.* Pratt, 3 Ves. Jun. CC. 730. (*l*) Middleton *v.* Messenger, 5 Ves. Jun. CC. 136.

money, ariſing from the 3 *per cent.* conſolidated funds, and alſo the profits ariſing from all my eſtates whatſoever, and the uſe of all my houſehold furniture, during the term of her natural life, and at her deceaſe, I give to my daughter-in-law, *A. L.* the intereſt ariſing from 1,500l. for her ſole uſe, during her natural life, but to ſtand in my name deceaſed. And if any misfortune, by ſickneſs or lameneſs, ſhould attend the ſaid *A. L.* that ſhe may at any time hereafter be rendered incapable of going to receive her intereſt money, my will is, that ſhe appoint, by letter of attorney, a perſon to receive the ſame. *Item*, I give and bequeath unto my ſiſter, *O. B.* and to my ſiſter, *C.* ten guineas each, annually, being the intereſt of 700l. to ſtand in my name deceaſed. The remainder of my money in the funds, and all my eſtates of every kind or nature whatſoever, to be ſold by a fair auction, and the ſums of money ariſing therefrom to be equally divided among brothers' and ſiſters' children; (*S. C.* excepted,) to whom I bequeath one ſhilling." The teſtator afterwards made the following codicil: "As the legatees die, the benefit of the intereſt monies to go into the family of my brothers' and ſiſters' children then ſurviving, ſhare and ſhare alike." The teſtator was poſſeſſed of leaſehold eſtates, beſides ſtock and houſehold furniture. The teſtator being dead, as alſo his widow who ſurvived him, and the teſtator's brothers and ſiſters having had ſeveral children living at his death, ſome of whom happened to die before the widow; the queſtion was, whether the general reſidue belonged excluſively to the children living at the widow's death, (except *S. C.*) or whether children who died between the death of the teſtator, and the death of his widow, were equally intitled with them? And by the *Maſter of the Rolls*, "I have looked over this will with much attention, and I do not ſay, I have not ſome doubt upon it; and that I have not in ſome degree changed my opinion in the conſideration of the queſtion. But upon the whole will taken together, with the codicil I am of opinion, the codicil, upon the true conſtruction, is not explanatory, but reſtrictive, a diſtribution only of ſo much as had by the will been appropriated; the intereſt of which he had given in different proportions to *A. L. S. C.* and *A. C.* By the will making no farther diſpoſition of the 1500l. and 700l. ſo appropriated, which are ſtill to ſtand in his name, he proceeds to diſpoſe of the remainder of his money in the funds, and all his other property after theſe appropriations. I underſtand he had ſeveral leaſehold eſtates. It appears to me upon the face of the will, and according to the conſtruction put upon words of diviſion, at the deaths of tenants for life, and the authority of *(m) Deviſme* v. *Mello*, that the remainder of

(*m*) *Supra.*

his money in the funds, and the produce of all his other eſtates, when ſold, were diviſible among all the children of his brothers and ſiſters, except *S. C.* living at his own death, and ſuch, if any, as might be born before the death of his wife, and the repreſentatives of ſuch as ſhould be dead in the life of his wife. That is fully eſtabliſhed in that caſe, in which every circumſtance contained in this occurs. It is clear upon that caſe, to which I perfectly ſubſcribe, that, under ſuch a diſpoſition, the fund is diviſible, among ſuch of the objects as are living at the teſtator's death, and ſuch as ſhall be born before the fund is diſtributable, and that they are veſted intereſts. If that be the true conſtruction of this will, and it is clearly ſo if *Deviſme v. Mello* be right, the queſtion is to what the codicil relates, and it was contended that it related not only to the ſums appropriated to the annuitants, but that it was explanatory of the words the teſtator uſed when ſpeaking of the remainder of his money in the funds, after that appropriation, and all his other eſtates; to reſtrain the diſpoſition as it does, as far as it relates to the ſubject of it, to children then ſurviving. But upon the true conſtruction of this codicil, I am of opinion, it was not to relate to any thing but the intereſt undiſpoſed of by the will, and that the teſtator did not mean to diſturb what was given by the will, but to diſpoſe of what had been left undiſpoſed of, the ſums of 1500l. and 700l. after the deaths of the annuitants. Declare that the reſidue of the teſtator's perſonal eſtate, after the appropriation of 1500l. and 700l. 3 *per cent.* &c. for ſatisfaction of the annuities given by the will to *A. L. S. C.* and *A. C.* is diſtributable among the children of the teſtator's brothers and ſiſters, (except *S. C.*) living at his death, and the repreſentatives of ſuch as died in the life of his wife." Again—

(n) A. by his will in 1797, bequeathed 5000*l.* part of his ſtock in the 3 *per cent.* bank-annuities in truſt for all the children of his niece, *T.* the wife of *T. T.* in equal ſhares, to be veſted intereſts in and transferred to ſuch of them as ſhould be ſons at 21; and in and to ſuch of them as ſhould be daughters at 21, or upon marriage with conſent, &c. with intereſt in the mean time for their maintenance and education, without regard to the ability of their father, with benefit of ſurvivorſhip among the children, if any of them, being a ſon, died under 21, or, being a daughter, before that age, or unmarried, without leaving iſſue, but if any of the children, being a ſon

(*n*) Barrington *v.* Triſtram, 6 Veſ. Jun. CC. 345. See alſo Graves *v.* Boyle, 1 Atk. 509. Haughton *v.* Harriſon, 2 Atk. 329. Maddiſon *v.* Andrew, 1 Veſ. 57. and Baldwin *v.* Carver. Cowp. 309. S. P.

or daughter, ſhould die under 21, leaving iſſue, ſuch iſſue were to be intitled to their parent's ſhares, with all the benefits annexed thereto. And if all *T.*'s children, except one, ſhould happen to die before they became intitled to any part of the 5000l. annuities, without leaving iſſue, then the teſtator gave the whole in truſt for ſuch only child, if a ſon, at 21, if a daughter, at that age, or on marriage with conſent, &c. But if all the children of *T.* died before they, or any of them, became intitled to the 5000l. annuities as a veſted intereſt, and without leaving iſſue which ſhould live to become intitled thereto, then he bequeathed the ſame to the children of his nephew, *B. P.* who ſhould be living at the death of the ſurviving child of his niece, *T.* &c. The teſtator died ſoon after the execution of his will, and *T. T.* alſo died in 1796, leaving ſix children by his wife, who afterwards marrying again, had a child by her ſecond huſband, born before the eldeſt child of the firſt marriage attained 21. The queſtion was, Whether the child of the ſecond marriage was intitled to a ſhare of the 5000l. annuities? Againſt whoſe claim it was urged by the counſel for the children of the firſt marriage, that if the conſtruction was extended to a child, coming *in eſſe* after the death of the teſtator, it muſt alſo be extended under the will, ſo as to give to the children of that child a proportion of the fund, at the age of 21, which would be prolonging the veſting to a period beyond that allowed by law, a difficulty which could not occur if it were underſtood, children living at the teſtator's death. But Lord *Eldon*, C. "The rule of the court now being to let in all children, until there muſt be a diſtributive ſhare given to one, the conſtruction upon the whole of this will ſeems to be, that every child muſt be let in, until ſome child attains 21, or dies leaving iſſue. The firſt attaining 21, muſt be paid his ſhare, and then it muſt be apportioned; unleſs ſome other prior event would compel you to fix the ſhares. The rule of the court has gone upon an anxiety to provide for as many children as poſſible, with convenience, therefore any child coming *in eſſe*, before a determinate ſhare becomes diſtributable to any one, is included. My private opinion is, that the teſtator never thought of his niece marrying again, but the object was the children of *T. T.* The words, 'The wife of *T. T.*' are merely words of deſcription. In the direction for maintenance, with regard to the ability of their father, I ſhould ſuppoſe he thought *T. T.* was alive, and that he meant him: but the words are not ſo, and if the rule is to include all children coming *in eſſe*, before there muſt be a diſtributive ſhare given to one: the words, 'their father,' in that paſſage, are not ſufficient to ſupport my private

opinion against the rule. In the gift over he excludes children of *B. P.* who should not be living at the death of the surviving child of *T.* There too, I think he meant children by *T. T.* but it would be very difficult to make out the title of the children of *B. P.* against the children of *T.* by any other husband. The difficulty put by the counsel for the children of *T.* by *T. T.* confirms my private opinion: but the rule requiring that all the children shall take who come *in esse,* before there is a necessity of determining the share of any child, it only comes to this; that the testator has given to persons whom the law makes certain, property, with a limitation over which cannot take effect, which happens every day. Notwithstanding a strong conjecture against my judicial opinion, I am bound to declare that every child of *T.* shall take who will come into existence before any son of *T.* attains the age of 21, or any daughter attains that age, or marries, or any child marries, and dies leaving issue; for a child may marry and die under 21, leaving issue."

The rule, as settled by the above cases, admits of a necessary exception, when *natural children* are the objects intended to be benefited under a general description of children; for a bequest to the *natural children* of *B.* will include those only who are living at the date and making of the will.

(o) *A.* bequeathed 3,000l. "to all the natural children of his son, the late duke of Devonshire, by Mrs. H." Question, whether the natural children born after the will should partake of the legacy? And by Lord *Parker*, C. "They shall not, for *A.* could never intend that his son should continue in this course, that would be to encourage it, and it was enough to pardon what was past; besides, bastards cannot take until they have acquired a name by reputation, for which reason, though I give to the issue of *J. S.* legitimate, or illegitimate, yet a bastard shall not take." It was then contended, that the directions of the will were for the executors to pay the 3000l. as *A.* should by *deed* appoint, and that afterwards *A.* by deed appointed the 3000l. "to all the children of his son by Mrs. H." so that the question depended upon the *deed*, which must refer to the children born at the time of its execution. And his lordship conceived the deed to be part of the will, and in the nature of a codicil, explanatory of it. And that the money directed to be paid by such deed, was a provision for such children, or reputed children of the duke, by Mrs. H. as were living at the date of it, but not for such children as he afterwards had by her. It being a further question, whether a natural child *in ventre sa mere* should take. The *court* inclined

(o) Metham *v.* Duke of Devon. 1 P. Will. 529.

to think that it could not, for a baſtard could not take until he had obtained the reputation of being ſuch a one's child, and that reputation could not be gained before the child was born.

It ſeems, that in order to enable *natural children* to take a benefit under wills, they muſt be particularly alluded to as *perſonæ deſignatæ*, for a bequeſt to "children," generally, or "to the eldeſt male or female child of *A.*" will not be permitted to include a natural child: Thus in a caſe where—

(*p*) *A.* by his will, gave the reſidue of his real and perſonal eſtate to truſtees, upon truſt, to place the perſonal in the funds, and apply a reaſonable part of the rents, ſums of money and intereſt, for the maintenance and education of all ſuch children as he might have at his death, equally, until they attained 21, or married, and then to pay ſuch of them attaining that age, or marrying, *one fourth part* of the whole income of his real and perſonal eſtate; but if one child only ſhould live to attain 21, or be married, to pay the whole income of his property to ſuch only child, if all his other children ſhould have died without iſſue, and in caſe any or either of the ſaid children ſhould happen to die, before *ſhe* or they reſpectively attained *her*, or their age of twenty-one years, or day or days of marriage reſpectively, or without iſſue, then the parts or ſhares of *her*, or them, ſo dying under age, unmarried, or without iſſue, ſhould go to and among, and be in truſt for, the ſurviving child or children, to be equally divided among them, ſhare and ſhare alike, if more than one, and be payable, when and as *her*, or their original parts or ſhares, ſhould by virtue of that, his will, become payable, and be liable to the ſame contingencies of ſurviving to and among the ſurviving child, or children, in caſe of the death of any of the ſaid children, in manner aforeſaid, as he had therein before directed concerning *her*, or their original ſhares or parts; and when his youngeſt child living ſhould have attained the full age of twenty-five years, then he directed all his real eſtates to be valued and divided into as many equal ſhares as he ſhould have children then living; or if any of them ſhould happen to be then dead, leaving iſſue, ſuch ſhare of his deceaſed child or children, to be ſold; and the money ariſing from the ſale, together with the proportional part of all his perſonal eſtate, as the original ſhare of his deceaſed child or children, to be veſted in the public funds; in truſt that the intereſt be divided among his ſaid grandchildren, the iſſue of ſuch his deceaſed child or children, until the youngeſt attained his or her age of twenty-one years, or day of marriage, which ſhould firſt happen; and at ſuch time to be transferred to them equally, ſhare and ſhare

(*p*) Cartwright *v.* Vawdry, 3 Veſ. Jun. CC. 482. See 1 Ves. & Bea. 422. Wilkinson *v.* Adam

alike; and in case all, or any of his daughters, should happen to marry, and not having any child or children of such marriage, should happen to die, then it was his will that the surviving husband should receive the income, arising from his deceased daughter's share, during his own life, not committing waste; and, when such division was made out, it was his will, that his eldest child, then living, should have the first choice of *her* share, and so of the rest according to their seniority; and *she*, or they, to have and to hold such share and shares of his real estates, lands, and premises, for and during the term of *her* and their natural life and lives, and to their issue, and the survivor of them for ever. The will then directed the executors to divide all the testator's personal estate into as many equal shares as he should have children then living, and to transfer, or make over to *her* or them, or the issue of *her* or them, all such share and shares for *her* and their respective use and benefit, at the same time when his youngest child, then living, should attain the age of twenty-one, or day of marriage, and in case all his said children should die before they attained their age or ages, or day or days of marriage, respectively, and without issue, then he directed that his executors should stand possessed of his estates, real and personal, and the dividends, interest, and produce thereof in trust, to pay the growing rents of his real estate, and the interest of his personal estate to his wife, during her life and widowhood, and after her death, or marriage, and in case of all his children dying as aforesaid, under age, unmarried, then he bequeathed all his estates, real and personal, to his next of kin, and heirs at law, absolutely, and he devised the guardianship and education of all his said children, during their minorities, unto his wife, and his executors: the guardianship of his wife to cease upon her marriage, provided that as soon as any of his *daughters* should happen to marry a person to the approbation of his executors, who would take the name of *C.* and live at his house at *O. G.* he directed his wife to resign the house to them, and he directed his executors to pay to his daughter's husband, when he had taken the name of *C.* 700l. over and above the common proportional share of his other children. And he farther directed that all his family plate, watches, and rings, should be valued and divided into as many equal parts as he should have children, and the first child who should come of age, or be married, to have the choice of their share, and such share given to them immediately. At the testator's death, he left his wife surviving and four daughters by her; the eldest of the daughters was born before the marriage of her parents, the remaining three, after that event. The eldest sister instituted the suit, claiming an equal interest with her sisters, under the fair construction of the will in regard to the testator's in-

tention, and upon the authority of evidence that ſhe produced, which proved, that the teſtator always treated her as a legitimate daughter, and intended to make proviſion for her equal with his other children. And her counſel inſiſted that upon this will, it was plain ſhe was in contemplation of the teſtator, to be conſidered a legitimate child, that the diſtribution in fourth parts pointed out diſtinctly that ſhe was in his contemplation, one of his four daughters, and muſt have alluſion to four children. That every expreſſion applied to females, which ſhewed he meant exiſting daughters, not future iſſue that might be either male or female. And Lord *Loughborough*, C. "This is a very unfortunate caſe. I have no doubt of the intention, but how can I poſſibly put upon the will the conſtruction the plaintiff deſires, when there are lawful children? The family will act very honourably and conſcientiouſly by giving way to the diſpoſition which is ſtated; but it is impoſſible in a court of juſtice to hold, that an illegitimate child can take equally with lawful children, upon a deviſe to children; had the daughter been named it would have done."—In another caſe—

(*q*) *A.* after giving ſeveral annuities by his will, proceeded in this manner, "And the firſt annuity of the great ones which falls in, I deſire may devolve upon the eldeſt child, male or female, of *W. H.*" Two annuitants of 100l. and 300l. having died a few days after the teſtator, the eldeſt daughter of *W. H.* claimed the annuity of 300l. which claim the *Maſter* diſallowed, upon the ground of her being a natural daughter. She excepted to the report, and it was proved on her behalf that the teſtator was very intimate with *H.* and his family, and knew he had no legitimate child, and that this daughter and all his other children were treated by him as children. But the *Maſter of the Rolls* over-ruled the exception, and, upon another occaſion, aſſigned his reaſons for ſo doing, as follows; "Upon the former exception by the eldeſt of the illegitimate children of *H.* a daughter who claimed as the perſon intended by the deſcription "of the eldeſt child," it was contended, that though by the determinations that have taken place, no one can claim under the deſcription of a child, but ſuch as can claim as a legitimate child; yet, upon the circumſtances appearing in evidence, the ſituation of *H.*'s family not unknown to the teſtator, a family of illegitimate children, recognized by their father as his children, that daughter was intitled to the annuity fallen in as *perſona deſignata*, in this will. Upon that exception, I was of opinion, there was not ſufficient to intitle an illegitimate child to claim, for whatever the real intention of the teſtator might be, and though it could hardly be ſuppoſed, he had not ſome children then exiſting in his contemplation; yet as the

(*q*) Godfrey *v.* Davis, 6 Veſ. Jun. CC. 43.

words are, "The eldeſt child," ſuch perſons only could be intended, who could intitle themſelves as children by the ſtrict rule of law, and no illegitimate children can claim under ſuch a deſcription, unleſs particularly pointed out by the teſtator, and manifeſtly and incontrovertibly intended, though, in point of law, not ſtanding in that character. Notwithſtanding the evidence of the teſtator's knowledge of the ſituation of this family, I did not think that intitled theſe children to claim under this deſcription."

The time appointed for diſtribution of the legatory fund, being, as before noticed, the period which the court of chancery has limited for fixing unchangeably the number of perſons to take by deſcription as legatees, it neceſſarily follows, that when a legacy is to take effect *immediately*, in all its conſequences, at the teſtator's death, the perſons only who anſwer ſuch general deſcription, *at that time*, will be intitled to ſhares in the bequeſt. Accordingly in a caſe where;—

(*r*) *A.* deviſed all his goods and chattels to *J. C.* and *J. H.* to be ſold, to pay his debts, and the overplus, if any, to be employed for the beſt uſe of their children begotten, by the teſtator's daughters, *M. C.* and *E. H.* equally to be divided between them. The daughters had children born before the will, others afterwards, and before the teſtator's death, and others after his death. Queſtion, which of the children ſhould take? And the *Chancellor* determined that the diviſion was to take place at the teſtator's death, and therefore, that all the children, born in the life-time of the teſtator took, but not thoſe born after his death. Again—

(*s*) *A.* after giving by his will two legacies, bequeathed thus, "*Item*, I give unto the children of my late ſiſter, *M. C.* the ſum of 2,000l. to be equally divided among them. *Note*, to the above three legacies, I deſire 100l. may be paid to each within one month after my death, to buy mourning, &c. after giving ſeveral other legacies, he bequeathed his reſiduary eſtate in this manner: "I give unto my brother *S. W.* one third of the reſidue, and one third more to my ſiſter *M. S.* and the other third I give to the children of my late ſiſter *M. C.* equally to be divided between the children of my brother *S. W.* my ſiſter *M. S.* and the children of my late ſiſter, *M. C.*" At the date of the will there were three children of *M. C.* living, *viz. J. E.* and *W.*—*W.* died after the date of the will in the life of the teſtator, and it was contended that one third of the 2,000l. given to the children of *M. C.* lapſed into the reſidue, and that one third of one third of the

(*r*) Roberts *v.* Higman, 12th July, 1799. 1 Bro. CC. 532, in notis. (*s*) Viner *v.* Francis, 2 Bro. C C. 658.

reſidue alſo lapſed, and became the property of the teſtator's next of kin. But the *Maſter of the Rolls* was of opinion, that by the words, "Children of *M. C.*" ſuch perſons only were meant, as ſhould be children at the death of the teſtator. And in another caſe—

(t) B. gave certain ſpecific legacies in truſt for all the children of his daughter *S.* then in exiſtence, naming them, to ſons at 23, and to daughters at 21, with intereſt in the mean time for their education, and directed the ſurplus to accumulate for the benefit of the legatees until 21, with benefit of ſurvivorſhip among them, in the event of any of them dying before thoſe periods. *A.* then proceeded to give the reſidue of his eſtate in truſt, for all his grand-children by his ſaid daughter *S.* to be applied for their benefit, as aforeſaid." The teſtator afterwards, by a codicil, gave ſome annuities for life, and directed that 1,000l. ſhould be ſet apart to anſwer them. It was determined that grandchildren born *after the teſtator's death*, ſhould not be permitted to take ſhares in the *reſidue* with thoſe born in his life-time, notwithſtanding a part of the reſiduary eſtate, to which the grand-children were intitled, was appropriated to anſwer a particular purpoſe, *viz.* payment of the annuities, and might not fall into the reſidue for a long period, for the *Chancellor* declared, that the whole fund was diſtributable at the teſtator's death, and that it would be repugnant to ſay, that one part of the reſidue ſhould go one way, and the other part, 1000l. another.

In the three caſes laſt ſtated, the bequeſts to the legatees were general, no time being fixed for payment; the funds, therefore, being diſtriſtutable, at the expiration of a year after the teſtator's death, adventitious legatees coming into exiſtence after that period, could not be admitted. But ſuppoſe the caſe to happen of a child being born within the year after the teſtator's death, it may be inferred, from attending to the principle of the other caſes, that ſuch child would be intitled to a ſhare in the bequeſt, equal to the other children living at the teſtator's death.

If the perſon deſcribed, and intended to take a teſtamentary gift, upon the death of another perſon, to whom it is given for life, or for a determinate period, be not in exiſtence at the arrival of the time appointed for it veſting in him beneficially, and there are other ſubſequent executory limitations of the ſame property, it ſeems that although ſuch perſon ſhould be born after the period laſt mentioned, he will not be permitted to claim the legacy, for the policy of the law is in favour of

(t) Hill *v.* Chapman, 1 Veſ. Jun. CC. 405. 3 Bro. CC. 391 *S. C.* See alſo Heath *v.* Heath. 2 Atk. 121. S. P.

veſted intereſts, ſo that the law will not, in this caſe, ſuſpend the rights of the ſubſequent legatees, on account of the poſſibility of a perſon named as a prior legatee coming into exiſtence, who might anſwer the deſcription, but who was not living, and therefore incapable of accepting the bequeſt at the period intended by the teſtator. Accordingly in a caſe where—(*u*) *A.* after giving ſeveral annuities by will, proceeded thus. "And the firſt annuity of the great ones which falls in I deſire may devolve upon the eldeſt child, male or female, for life, of *W. H.*" and then gave directions relative to the intereſt of his property in the event of it being either more or leſs than enough to anſwer the annuities, and bequeathed the annuities as they fell in, except two only, to the ſurviving annuitants, and upon the death of the ſurvivor he gave the whole property to the heirs male of *P. F.* and in default of iſſue to the female branch of the family of *P. F.*—*B.* and *C.* two annuitants of 200l. and 300l. died a few years after the teſtator, upon which the eldeſt legitimate child of *W. H.* (a prior claim of an elder illegitimate child of *W. H.* being diſallowed (*x*),) having claimed the annuity of 300l. under the will, though not born previous to the death of the firſt annuitant; the queſtion for the court's opinion was, whether ſhe was entitled to it or not, her claim being diſallowed by the maſter, to whoſe report ſhe excepted. And on this claim, the *Maſter of the Rolls* gave the following opinion. "This daughter being born after the marriage of her parents, has certainly a right to claim as the eldeſt child, provided the teſtator did not intend upon this will a diſpoſition at a given period; with reſpect to this, the firſt conſideration is, whether upon this will, enough appears to prove the teſtator intended that immediately upon his death theſe annuities ſhould take place; whether the whole produce of his property, though portioned out into annuities, was not manifeſtly intended to be divided among all theſe annuitants in different proportions according to the degree of their annuities? And I am of opinion that it is neither more nor leſs than a diviſion of the whole intereſt of his fortune that might ariſe during the lives of any of the perſons there named, be it more or leſs in proportion to their annuities, except the two annuities above alluded to, which I lay totally out of the caſe upon this queſtion; with the qualification, that if any die, there ſhould be a ſubſtitution in the room of the firſt dying. I am not under the neceſſity of ſaying which are to be conſidered the great annuities, I conſider all as the great annuities for the purpoſe of intitling the child of *W. H.* to the firſt that might fall in. In the view I have of this will,

(*u*) Godfrey *v.* Davis, 6 Veſ. Jun. CC. 43. (*x*) *Suprà.*

it makes no difference whether the right of ſurvivorſhip and of ſubſtitution in favour of the perſon deſcribed as the eldeſt child of *W. H.* attached upon the firſt or ſecond of the annuities now vacant. The next queſtion is, whether as upon the death of the firſt annuitant, there was no perſon anſwering the deſcription living, that annuity was to be divided among the ſurvivors, or to be ſuſpended, and the profits to accumulate to ſee whether any ſuch perſon ſhould come *in eſſe*. It is clearly eſtabliſhed by *Deviſme* v. *Mello* (*y*), and many other caſes, that where the teſtator gives any legacy, or benefit to any perſon, not as *perſona deſignata*, but under a qualification and deſcription at any particular time, the perſon anſwering that deſcription, at that time, is the perſon to claim, and if there are any perſons anſwering the deſcription, they are not to wait to ſee whether any other perſons ſhall come *in eſſe*, but it is to be divided among thoſe capable of taking, when by the tenor of the will he intended the property to veſt in poſſeſſion. That caſe was much conſidered by lord *Thurlow*, and ſeems to have ſettled the law upon the ſubject; the firſt queſtion is, whether it is clear the teſtator meant any given ſet of perſons ſhould take at any given time, if ſo, it is clear all perſons anſwering the deſcription, whether born before or afterwards, ſhall take, but if there are no ſuch perſons, it ſhall not ſuſpend the right of others, but they ſhall take as if no ſuch perſons were ſubſtituted. Before that caſe, this point was not quite ſo clear. Where the gift is to all the children of *A.* at twenty-one, if there is no eſtate for life, it will veſt in all the children coming into exiſtence until one attains the age of twenty-one, then that one has a right to claim a ſhare, admitting into participation all the children then exiſting, ſo if it be to a perſon for life, and after the death of that perſon to the children of *A.* the intention is marked, that until the death of the perſon intitled for life, no intereſt veſts, when that perſon dies the queſtion ariſes, whether there are then any perſons anſwering the deſcription, if ſo, they take without waiting to ſee whether any others will come *in eſſe* anſwering the deſcription. If it be given over in the event that there are no children, and there are no children at that period, the perſon to whom it is given over takes. It is clear, that this teſtator meant theſe annuities to commence at his death, and that each annuitant ſhould receive a proportionable ſhare of his fortune, with benefit of ſurvivorſhip, and right of accruer, ſubject upon the death of the firſt annuitant to the ſubſtitution of the eldeſt child of *W. H.* Upon the death, therefore, of the firſt annuitant, unleſs there was ſome one who had a right of ſubſtitution in the room of that perſon,

(*y*) 1 Bro. CC. 537, and *ſuprà*.

and there was no ſuch perſon, it was to go among the ſurvivors. The perſon ſubſtituted, viz. the eldeſt child of *W. H.* not having been then in exiſtence, cannot now claim. That conſtruction is much fortified by the manner in which it is given over, for it is perfectly clear, that he meant the perſons to whom it is given over under the deſcription of heirs of *P. F.* to take upon the death of the perſons to whom it was firſt given. If the conſtruction contended for is to prevail, thoſe perſons, ſuppoſing all the other annuitants claiming by ſurvivorſhip were dead, muſt wait not only the death of the ſurvivor, but alſo the death of *W. H.* for during his life, there would be a poſſibility, that a child might be born who upon that conſtruction might ſay he was the ſurvivor, that would be quite contrary to the words and what muſt be ſuppoſed the intention." His honour was therefore of opinion that the intereſt in the annuities was intended to veſt in poſſeſſion, and unleſs there were ſome perſon to claim under the ſubſtitution, the whole intereſt would ſurvive to the others, until the death of the laſt ſurvivor, and that there was no perſon to anſwer that deſcription at the time the event took place. Therefore the claim was diſallowed, and the exception over-ruled.

The queſtion, whether an infant in *ventre ſa mere*, can take a ſhare in a fund bequeathed to children, under a general deſcription "of children living at the teſtator's death," does not appear to have been finally ſettled till lately by the deciſion of the court of *Common Pleas* in favour of the infant in the caſe of *Clarke* v. *Blake*, ſent out of chancery for the advice of the judges, and which was to the following effect.

(z) *A.* by his will deviſed the premiſes in queſtion to his brother *H. C.* for life, with remainder "to the uſe and behoof of all and every ſuch child or children, whether male or female, of his brother *H. C.* as ſhould be living at the time of his deceaſe, other than and except *B.* his the teſtator's niece, as tenants in common, and not as joint tenants, and of the ſeveral and reſpective heirs and aſſigns of ſuch child or children for ever." *H. C.* ſurvived the teſtator, and at his death left three daughters, and his wife pregnant with another daughter, who was afterwards born. The queſtion was, whether the daughter in *ventre ſa mere* at the death of *H. C.* was entitled with her ſiſters under the deſcription in the will, as a child living at her father's death? Lord Ch. J. *Eyre*, "I have no doubt on any view of this caſe. It is plain on the words of the will, that the teſtator meant, that all the children whom his brother ſhould leave behind him ſhould be benefited: but independent

(z) 2 H. Blackſt. Rep. C. P. 399. 2 Bro. CC. 320. 2 Veſ. Jun. CC. 673. S. C.

of this intention, I hold that an infant in *ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of "children living at the time of his decease." *Buller*, J. "In equity there are two classes of cases on this subject; the first, where the bequest is in the nature of a portion or provision for children, and there, an after-born child takes his share with the rest, of which class is the case of *Millar* v. *Turner*, 1 Ves. 85. (*a*). The second, where the bequest arises from some motives of personal affection, and there it is confined to children actually in existence. Of this second class was the case of *Cooper* v. *Forbes*, 2 Bro. CC. 63. (*b*), which therefore makes a striking difference between that case and the present. Here the bequest is not confined to children living at the death of the testator, but is kept open till the death of his brother. It seems, indeed, now settled, that an infant *en ventre sa mere*, shall be considered, generally speaking, as born for all purposes for its own benefit. *Lancashire* v. *Lancashire*, 5 Term Rep. B. R. 49.—*Heath* and *Rooke*, Js. were of the same opinion. Lord Ch. J. *Eyre*, "The two classes of cases in equity proceeded on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever."

It seems that this decision of the court of *Common Pleas*, and approval by the court of chancery, have shaken the authority of the second class of cases referred to in it. It is truly observed by the chief justice, that the distinction taken by the cases between the circumstance when the legacy is given to children as a portion, and when as a bounty in regard to admitting or not letting in a posthumous child to take a share in the bequest, is too subtle and unsatisfactory; for when it is considered how very inconsistent with probability it is, that when a person bequeaths a legacy in such general terms, as "to the children of *A.* living at *A.*'s death," he should intend that those only should take who might be actually born at *A.*'s decease, and that a child *en ventre sa mere* should be excluded, merely because it happened not to come into existence, until a few days or weeks after *A.*'s death, it becomes a subject of surprize and wonder, how such a distinction should ever have prevailed, as we find in the cases. Besides, the construction that a child *en ventre sa mere* might take under so general a description, was offering no violation to any rule of law, as the law itself in most instances considers a posthumous child, the same as a child in actual existence. A devise to it is good (*c*). It may be vouched

(*a*) Beale *v.* Beale, and Northey *v.* Strange, 1. P. Will. 244, 341. (*b*) Ellison *v.* Airey, 1 Ves. 111. Pierson *v.* Garnet, 2 Bro. CC. 38. and Bennet *v.* Honeywood, Ambl. 708. 711. (*c*) Scatterwood, *v.* Edge, 1 Salk. 229.

in a recovery, though for the purpoſe of anſwering over in value (*d*). It may be the object of murder (*e*). It may take under the ſtatute of diſtributions as living at the inteſtate's death (*f*). It may be intitled to the benefit of a charge for raiſing portions for children living at the death of the teſtator (*g*). It may obtain an injunction to ſtay the commiſſion of waſte to its diſadvantage (*h*). It will prevent a remainder from taking effect which depended upon the death of its father without leaving iſſue (*i*). A limitation to it for life, with remainder to its firſt and other ſons ſucceſſively in tail, will, as it ſeems, be a good limitation, which could not be unleſs a poſthumous child is conſidered in law a child *in eſſe* (*k*). Upon the whole it appears to be a right concluſion that there is no reaſon why a child in *ventre ſa mere*, ſhould not be conſidered generally as in exiſtence, and the modern authorities, and ſolemn declarations of the judges in them and in other caſes are ſufficient to authoriſe this propoſition, viz. "that poſthumous children are entitled to all the privileges and advantages of other perſons."

A diſtinction muſt be obſerved between caſes, when a *ſtranger* bequeaths to the deſcendants of another perſon by the word "Children," and when a parent is the teſtator, and adopts this term in providing for his family. We have conſidered the effect of diſpoſitions by the former in the beginning of this chapter, but ſince parental diſpoſitions involve the conſideration of relative duty and obligation, a more liberal conſtruction is generally given to the latter. Accordingly, in a caſe where a father in making proviſion for his family by will, appeared upon a fair inference from the whole inſtrument to have uſed the term "children," in the clauſe providing for their maintenance in ſuch a manner as to render it almoſt certain, that he had in contemplation, and only intended to provide for thoſe living at the date of his will; other children happening to be born afterwards, it was determined, that the latter children were entitled to the benefit of this proviſion, equally with thoſe living at the date of the will. The caſe was to the following effect—

(*l*) *A.* after certain legacies, deviſed and bequeathed to truſtees all his freehold, copyhold, and leaſehold property, and all his perſonal eſtate, upon truſt, to receive the rents, intereſt,

(*d*) 1 Inſt. 390. a. (*e*) 3 Inſt. 50. 51. (*f*) Edwards *v.* Freeman, 2 Will. 446. Wallis *v.* Hodſon, 2 Atk. 114. (*g*) Hale *v.* Hale, Pre. Ch. 50. (*h*) Muſgrave *v.* Parry, 2 Vern. 710. (*i*) Burdet *v.* Hopegood, 1 P. Will. 487. (*k*) Long *v.* Blackall, 3 Veſ. Jun. CC. 486. 7 Term. Rep. K. B. 700. S. C. and per *Buller* J. Thelluſon *v.* Woodford, 4 Veſ. J. CC. 322. (*l*) Matchwick *v.* Cock, 3 Veſ. Jun. 609.

and produce of ſuch eſtates reſpectively, and apply ſo much thereof, as might ariſe from ſuch parts of his real and perſonal eſtates as remained after payment of his debts, funeral expences, and legacies, and the expence of proving his will, for the maintenance of his wife *B.* and for the maintenance, education, and bringing up his children, in ſuch manner, parts, and proportions, as to his truſtees ſhould appear moſt beneficial, until the death of his wife. *A.* then directed his truſtees to ſell a particular eſtate with all convenient ſpeed, and inveſt the purchaſe-money in the public funds, and apply the dividends thereof in manner laſt before-mentioned. He alſo gave a diſcretionary power to his truſtees, to diſpoſe of any reaſonable parts of his money in the funds as a premium to place out his ſon *T. M.* as a clerk or apprentice, or for the advancement or promotion of either of his daughters, whenever it might be thought neceſſary. And he directed his truſtees on the event of his wife's ſecond marriage, to withhold from her all or any part of the ſaid rents, intereſt, dividends, and produce, and to apply the whole thereof to the maintenance and education of his children, (the truſtees being guided by the prudence or imprudence of his wife's ſecond choice.) He moreover directed his truſtees to convey, immediately after his wife's death, a meſſuage and lands at *E.* unto his ſaid ſon in fee, or according to the tenure thereof; and alſo immediately after his wife's death, to aſſign, transfer, pay, and deliver over unto each and every of his daughters, who might be then living, 1000l. clear, unleſs they or either of them before that time ſhould have had any advancement or portion under the power before reſerved to his truſtees for that purpoſe, and in that event, then only ſo much as would make the portion or fortune of either of his daughters 1000l. The teſtator further directed his truſtees at the time laſt aforeſaid, to aſſign and deliver unto his children, all his houſhold goods, furniture, plate, linen, china, and books, his wife being permitted to have the uſe thereof; and alſo to aſſign, transfer, pay, and deliver unto his ſaid ſon, all the reſt of his property, regard being had to the minority of his children, ſo as not to inveſt them with any ſuch property until they attained the age of twenty-one.—And he appointed the truſtees executors. The teſtator at his death left his widow and five children ſurviving:—Of the children, three were living at the making of the will, and two were born afterwards.—And the queſtion was, whether the two children born after the date of the will, were intitled to the proviſion made for the maintenance and education of the teſtator's children, during the life of the widow? or whether the children living at the date of the will, were excluſively intitled to that proviſion? And by the *Maſter of the Rolls*,—"It is very clear, that if the teſtator has really forgot, that he may

have other children, and has upon the face of the will given to those living at that time, and omits those to be born in future, it is impossible to supply that defect, and to give them any provision, however the court may wish it: but by the certificate in a case before Lord *Mansfield*, the Court of *King's Bench* has gone a vast way towards it; holding an after-born child intitled, though he was not in contemplation. This testator, bound by every obligation to provide for his children, uses words, which unless controuled by subsequent words, would be sufficient to comprehend them all. Then comes a power to the trustees to apply a part of the fund in placing out his son, or for the advancement or promotion of either of his daughters. That is very strong to shew, he had forgot the possibility of having any more. He then goes on to divide his property after his wife's death, and gives to his daughters 1000l. each, in words that would take in other daughters, viz.—'To each and every of his daughters who might be then living.' He then gives the residue to his son. It is certainly impossible under this will, to admit after-born sons to a share of the residue: or to give them the sums provided for daughters. But those questions do not arise now; one cannot but suspect, and, *if it were not in the case of parent and child*, one must make the inference, that he only intended to provide for that son, and those two daughters; but it was an obligation upon him at his death, to provide for all his children. I must construe it every way, if possible, to apply the words to after-born children; and I will not deprive them of the provision, which under the general words, they may be supposed to have. Declare, therefore, that during the life of the testator's wife, the rents and profits of the real estate and the interest of the personal estate, are applicable to the maintenance, education, and bringing up of *all* the children."

The word "heirs," has been considered synonimous to children.—Thus where a legacy was bequeathed to the heirs of *B.* it was determined that *B.*'s children only, and not their descendants should have the legacy.

(*m*) *A.* by will bequeathed in this manner, "*Item*, I give to my sister *L.*'s heirs 6000l." "I give to my sister *B*'s. children equally 1000l." *L.* had two daughters only, one of whom died before the testatrix, leaving three children, and the question was whether the children of the deceased sister were intitled to their parent's share? which depended upon the interpretation to be given to the word "heirs." And Sir *Thomas Clarke*, M. R. was clearly of opinion, that the testatrix intended to give the 6000l. to the children of *L.* the same as in the subsequent clause to *B.*'s children, and had not their descendants in

(*m*) Loveday *v.* Hopkins, Ambl. 273.

view; or if she had, that as she had not expressed herself sufficiently, the court could not construe the will so as to let them in to take. In another case, where—

(*n*) *A.* bequeathed all the residue and remainder of his estate and effects to his "next of kin," or "heir at law," whom he appointed executor; the question was, whether the heir at law, or a surviving brother of the testator, or the brother in conjunction with other persons claiming under the statute of distributions as next of kin, were intitled to the residue? and the *Chancellor* determined in favour of the next of kin.—And—

In *Holloway* v. *Holloway*, (*o*) the Master of the Rolls expressed an opinion, although it was not necessary for him to pronounce judgement upon the point, that the term "heirs" when applied by testament to personal property, must be understood to mean "next of kin," as they are the only persons designated by law to succeed to that kind of estate.

The word "children," is naturally a word of purchase, and is never considered as a word of limitation, unless for the purpose of effectuating the testator's intention. Thus—

(*p*) *A.* bequeathed four parts of his residuary real and personal estate to his niece *B.* "and the children born of her body." *B.* had no child at the making of the will, but had one born afterwards, and *B.* died in the testator's life-time. It was determined that *B.* and her child took as joint tenants, so that the child surviving its mother and the testator, was intitled to the whole by survivorship.

In order to answer the occasions of families, and the intent of parties "younger children," have been construed to mean such only as were not intitled to the family or real estate; accordingly in cases of provisions made for younger children, either by deed or will, the family estate being limited to the eldest son and his issue, with remainder to his brothers and their issues successively, a younger brother eventually becoming intitled to the family estate, before the time of payment, has been considered an *eldest* child, so as to exclude him from the benefit of the provision for younger children.—Accordingly—

(*q*) *B.* by marriage articles, having a power to appoint the sum of 800*l.* for younger children after his wife's death, with a proviso "that the eldest son or the son possessing the estate charged, should have no share of the 800*l.*" appointed the 800*l.* to *D.* and his other younger children by name, having at that time an eldest son *J.* a second *D.* and five other children. After the appointment and before the mother's death, *J.* died, so that *D.* became

(*n*) Lowndes *v.* Stones, 4 Ves. Jun. CC. 649. (*o*) 5 Ves. Jun. CC. 399. (*p*) Buffar *v.* Bradford, 2 Atk. 220. (*q*) Broadmead *v.* Wood, 1 Bro. CC. 77. Chadwick *v.* Doleman, 2 Vern. 528. Jermyn *v.* Fellowes, Forrest, 93. and Teynham *v.* Webb, 2 Ves. 198. S. P.

an eldeſt ſon, and the eſtate charged with the 800l. deſcended to him, and the queſtion was, between the other younger children, and the repreſentatives of *D.* he being then dead, whether they in his right were intitled to a ſhare of the 800l.? and Lord *Thurlow* was of opinion, that they were not.

An "eldeſt daughter" deſtitute of proviſion, though not anſwering the deſcription of a younger child literally, has notwithſtanding been conſidered ſuch, in order to anſwer the general intention.—Thus—

(*r*) *A.* being tenant for life, remainder to his firſt, &c. ſons in tail male, with remainder to his brother *B.* in tail, and having no iſſue, joined with *B.* in a recovery to the uſe of himſelf for life, remainder to ſuch woman as he ſhould marry, remainder to his firſt, &c. ſons, in tail male, remainder to *B.* in tail male, remainder to himſelf in fee, with a power for *A.* by deed or will, to charge the eſtate with 2000l. portions for younger children, who ſhould be living at his death, in ſuch proportions as he ſhould think fit. *A.* married, and had iſſue two daughters only, one of whom was born after his death. *A.* by will charged the eſtate with 2000l. to his eldeſt daughter *M.* payable at 21 or marriage, and if the child, with which his wife was then enſient, ſhould prove a daughter, he ordered the 2000l. to be equally divided between her and *M.* One of the queſtions was, whether *M.* could take under the appointment as not being a younger child? and by Lord *Harcourt*, C. "the eldeſt daughter, though firſt born, when there is a ſon, has been often ruled to be a younger child. Every one but the heir is a younger child in equity, and the proviſion which ſuch daughter will have, is but as a younger child's, in regard the ſon goes away with the land as heir; ſo here, the eſtate by the ſettlement, goes all to the remainder man who is *hæres factus*, and neither of the two daughters is heir, wherefore the elder daughter having no more than the younger is, as to this proviſion, a younger child, and conſequently capable of taking it."

Upon the ſame principle, "an eldeſt ſon" has been conſidered a younger child, when the family eſtate was given away from him, or he otherwiſe unprovided for.

(*s*) *A.* by will gave to his brother and ſiſter *J.* and *S.* all his effects, if his ſiſter *M. T.* had no child or children at his death, or within twelve calendar months afterwards, but if ſhe had any child or children at his death, or within twelve calendar months after, he gave one third part of his property to the *youngeſt* of her children within the time above-mentioned, and the other two thirds he directed to be divided between *J.* and *S.* But if either were dead at his

(*r*) Beale *v.* Beale, 1 P. Will. 244. Alſo Butler *v.* Duncombe, ibid. 451. Heneage *v.* Hunloke, 2 Atk. 456, and Pierſon *v.* Garnet, 2 Bro. CC. 39. S. P. (*s*) Emery *v.* England, 3 Veſ. Jun. CC. 232.

deceaſe, the ſurvivor was to receive the other's third, unleſs *S.* ſhould have a child or children, in which event, her third was to belong to her youngeſt child, otherwiſe to her: and if *J.* were dead at his deceaſe, his third was to be divided between *S.* or her youngeſt child and *M. T.*'s *younger child*. *J. T.* was the only child and ſon of *M. T.* living at the teſtator's death, but ſhe had ſeveral born afterwards. And the Lord *Chancellor*, without argument, was clearly of opinion, that *J. T.* was intitled to one third of the teſtator's property and decreed accordingly.

(*t*) *R. D.* by deed in 1706, limited lands, (which were ſettled on him and his eldeſt ſon *R.* and their heirs) after their deaths without iſſue male to the uſe of their executors, for 1500 years, in truſt, that if *T. D.* ſhould at the commencement of the term have more ſons than one, or one only, and one or more daughters, to raiſe for their portions ſuch ſum of money, not exceeding 1500l. as the ſurvivor of *R.* the elder, and *R.* the younger, ſhould by deed appoint, and in default thereof, to raiſe 1500l. to be equally divided between ſuch ſons and daughters at the end of ſix months after the commencement of the term. But if no ſuch *younger* children were living at the beginning of the term, or if the perſon next in remainder intitled to the inheritance ſhould pay the portions, or if the ſame ſhould be raiſed, the term was to be ſurrendered, and after its determination the lands were limited to the uſe of ſuch ſon of *T. D.* as the two *R.*'s, or the ſurvivor ſhould by deed or will appoint in tail male, and for want of ſuch iſſue or appointment to the uſe of the firſt and other ſon and ſons of *T. D.* ſucceſſively in tail male, with remainder to the right heirs of *R.* the elder. *R.* the elder and *T. D.* died in the life of *R.* the younger, who by deed in 1716, appointed the eſtate at the end of the term to the uſe of *R.* the third ſon of *T. D.* in tail male, directing that he ſhould be the ſon of *T. D.* who ſhould firſt take, and reſerved a power of revocation. *R.* the younger died in 1732, without iſſue, and without revoking the appointment; but without making appointment of any ſum for the younger children of *T. D.* The children of *T. D.* who were living at the commencement of the term, were three ſons and one daughter, *George* and *Robert*, the ſaid *R.* and *Ann*. Queſtion, whether *George* being the *eldeſt* ſon, was intitled to a ſhare of the 1500l. as a *younger* child, the family eſtate being given away from him to his younger brother *R*? And by the court;—"No queſtion, but where a proviſion is made by a father, either by will or ſettlement for younger children, an eldeſt child unprovided for, ſhall be deemed ſuch, and the ground is, that every branch ſhall be provided for, the court not conſidering the words *elder* or

(*t*) Duke *v.* Doidge, 2 Veſ. 203, in notes.

younger. Suppoſe this had been by marriage-ſettlement, on the authority of the caſes cited, he would have taken as a younger child, and there is no diſtinction between marriage-ſettlements, in ſuch a caſe as this, and where the ſettlement is by will, or voluntary deed, where the proviſion has moved from a parent. The next queſtion is, whether there is any difference, where the ſettlement is made by a father's brother to collateral relations, a nephew, &c. and it is manifeſt that the brother *R.* the elder, meant to provide for all the branches of his family, and that every child of his brother *T. D.* ſhould have ſome proviſion. The difficulty ariſes upon the introduction of the word *younger*. It is rightly obſerved, that in the former parts the contingency is, if he ſhould have more ſons than one, which is, more than one who ſhould have the eſtate. *Younger*, as a relative word without any antecedent, is to be rejected, and the ſame as if it were to ſuch ſons as ſhould be over and above one. No caſe comes up to this: yet they all are, that every child except the heir is conſidered in equity as a younger, and that elderſhip not carrying the eſtate along with it is conſidered not ſuch an elderſhip as ſhall exclude by virtue of ſuch clauſes: and it would be hard, that the right of elderſhip ſhould be taken away, and yet not have the benefit of it as a younger child."

Upon ſimilar reaſoning it has been determined, that a child, born in the life-time of its parent the teſtator, to whom a legacy was given by the deſcription of "poſthumous child," was intitled to it, though not anſwering that deſcription literally at the teſtator's death.

(*u*) *A.* being indiſpoſed, and his wife *enſient*, made his will, and gave to his daughter then living 1500l. and if his wife ſhould have a *poſthumous* daughter, ſuch child was to receive 500l. of the 1500l. The wife having been delivered of a daughter during the life of her huſband, which prevented the daughter from anſwering the deſcription of poſthumous, according to the uſual acceptation of the word, the queſtion was whether ſhe was entitled to the 500l. and Lord *Somers*, C. was of opinion, that the ſecond daughter though born in her father's life-time, was to be conſidered a poſthumous child within the meaning of the will.

It muſt be noticed in the application of the above doctrine, that a younger child is never conſidered an elder or eldeſt, nor an elder or eldeſt child a younger, except between parents and children, or children and perſons ſtanding or placing themſelves *in loco parentum*, for in all other caſes, the legatee muſt anſwer the deſcription in the will, or he will not be allowed the benefit of the bequeſt. Thus—

(*x*) *R. H.* by his will deviſed lands to truſtees for a term of years, to raiſe 6000l. and afterwards by a letter, which was

(*u*) Jaggard *v.* Jaggard, Ch. Pre. 177. (*x*) Hall *v.* Hewer, Ambl. 203.

proved as a codicil, to *J. H.* his brother, and one of the trustees, directed as follows,—"I have given you and Mr. *Hall*, a power to mortgage for payment of 6000l." and I beg that that sum may be lent to Mr. *Hall*, and that you will take such securities from him as he can give, to indemnify you and your children from payment of it, *and in case of your death without children*, I desire it may be secured to the *younger* children of Mr. *Hall*. The testator by his will devised his real estate to *J. H.* for life, remainder to his first and other sons in tail, remainder to daughters in tail, and in case of the death of *J. H.* without such issue, then to the plaintiff *H.* second son of Mr. *Hall*, in fee. *James*, the eldest son of Mr. *Hall*, died in the life-time of *J. H.* by which *H.* became the eldest son. Question, whether *H.* was intitled to part of the 6000l. under the description of younger child of Mr. *Hall*. Lord *Hardwicke*, C. after observing that the right to the 6000l. was contingent during the life of *J. H.* on the event of whose death without issue, it only became a charge, said "the question is, who are entitled to the 6000l.? It was argued for the plaintiff *H.* that he was entitled to a part, as being a younger child at the death of the testator. On the other side, two arguments were offered,—first, that the plaintiff was to be considered as an *eldest* son *quoad hoc*, because the testator has given him the inheritance of this estate; secondly, that the testator meant such as should be younger children at the time the contingency happened.—The first goes too far, *there is no case where the court has considered a younger child as an eldest, but between parent and children, or those who stand in loco parentis.* This is the case of a stranger. The second reason holds, I am of opinion that the 6000l. did not vest till the death of *J. H.* and then in such persons as were at that time younger children of *Hall*, consequently the plaintiff is not intitled."—Again—

(y) *S. R.* by his will, bequeathed in this manner: "I desire that my executor will at his decease, bequeath 100 guineas to *L. C.* for the use of his *seventh*, or youngest child, in case he should not have a seventh child living." *L. C.* had six children living at the testator's death; a *seventh* who had been born, was then dead. The next child born to *L. C.* after the death of the testator, was a son named *Septimus*, and there were several other children. Question, whether *Septimus*, or the youngest child of *L. C.* should take the legacy? And the *Chancellor* thought that *Septimus* being in fact the *eighth* child born, could not take by the description of *seventh*, and therefore he decreed in favour of the youngest child.—And in another case,

(y) Wilson. The Lord Primate of Ireland, 3 Bro. CC. 148.

(z) *N. F.* gave by his will, among other legacies, 3000*l.* reduced bank consolidated annuities, to be equally transferred and divided between the *six* children of *J. S.* and *M.* his wife, at their ages of 21, but if any of them died before that age with benefit of survivorship, and in the event of the death of all, he gave the whole to *M.* their mother, and in case of her death, he gave the same to his executors equally, &c.—The testator added two codicils to his will, by the last of which he merely made provision for the two children of his grandson, whom he omitted to mention in his will. At the testator's death, *J. S.* had *seven* children by *M. six* of whom were living at the date of the will, and *E. S.* the *seventh*, was born afterwards, but before the making of the codicils, and one of the questions was, whether *E. S.* should take a share of the 3000*l.* with her brothers and sisters, and it was determined that she should not, as not answering the description of the bequest.

The necessity for legatees to answer the description and character given of them in the will, also appears from the following case; though indeed, that description and character when not fully answered, may in some cases, the legatees not being to blame, be dispensed with, as in those instances above given, and in those mentioned in the case next stated.

(a) *B.* under a power contained in articles made between her and *T. L.* prior to their supposed marriage, by her will, made the following bequest:—"To my *husband*, the said *T. L.* the sum of 150*l.*" which she directed to be paid in manner therein mentioned. *T. L.* at the time of his supposed marriage with *B.* was the husband of another woman, and upon a question whether *T. L.* was intitled to this legacy, the *Master of the Rolls* delivered his opinion to this effect:—"This case has stood a long time for judgment, and I believe the reason I have not been desired to give my judgment, is, that it has abated, and perhaps it may be unnecessary to give it. But as upon very full consideration, I have made up my mind it may be of use that the parties may know my opinion, in case they think fit to revive it. The cause arises upon the will of *B.* who supposed herself to be married to *T. L.* with whom she had celebrated a marriage. It now appears that he was a married man at that time: therefore she is in fact a single woman, and it was a gross fraud as to her. She made her will in execution of the power given to her by the articles, executed previously to the supposed marriage, and not aware that she was a single woman: upon that will the questions arise. The question is, whether this legacy of 150*l.* is or is not a legacy which this man can

(z) Sherer *v.* Bishop, 4 Bro. CC. 55. (a) Kennell *v.* Abbot, 4 Ves. Jun. CC. 802.

claim under the circumſtances, that it is given to him as the huſband of the teſtatrix, though he does not poſſeſs that character? I thought it a caſe rather novel, in its circumſtances, and that ſcarcely has afforded any deciſion in the law of *England*, though there are ſome *dicta* in the *civil* law, which ſeem to bear upon the point. The paſſage in the *digeſt*, is *falſam cauſam legato non obeſſe verius eſt, quia ratio legandi legato non coæret: ſed plerumque doli exceptio locum habebit, ſi probetur alias legaturus non fuiſſe* (*b*). The meaning is, that a falſe reaſon given for the legacy, is not of itſelf ſufficient to deſtroy it: but there muſt be an exception of any fraud practiſed; from which it may be preſumed, the perſon giving the legacy would not if that fraud had been known to him, have given it. That from a book of great authority ſeems to be the principle of the civil law. The queſtion is, whether, according to the law of *England*, that can apply to a caſe like the preſent? and whether the law will permit a man, who obtains a legacy in ſuch a manner, to have the benefit of it? I have not been able to find any thing that bears any very deciſive analogy to this: but upon general principles I am of opinion it would be a violation of every rule which ought to prevail as to the intention of a deceaſed perſon, if I ſhould permit a man, availing himſelf of that character of huſband of the teſtatrix, and to whom in that character a legacy is given, to take any part of the eſtate of a perſon whom he ſo groſsly abuſed; and who muſt be taken to have acted upon the duty impoſed upon her in that relative character. I deſire to be underſtood not to determine that, where from circumſtances not moving from the legatee himſelf, the deſcription is inapplicable, as where a perſon is ſuppoſed to be a child of the teſtator, and from motives of love and affection to that child, ſuppoſing it his own, he has given a legacy to it, and it afterwards turns out, that he was impoſed upon, and the child was not his own, I am not diſpoſed by any means to determine that the proviſion for that child ſhould totally fail; for circumſtances of perſonal affection to the child might mix with it, and which might intitle him, though he might not fill that character in which the legacy is given. My deciſion, therefore, totally avoids ſuch a point. Neither would I have it underſtood, that if a teſtator in conſequence of ſuppoſed affectionate conduct of his wife, being deceived by her, gives her a legacy; as to his *chaſte* wife, evidence of her violation of her marriage vow, could be given in evidence againſt that. It would open too wide a field. But this deciſion ſteers clear of that point. This is a legacy to her ſuppoſed huſband, and under that name. He was the huſband of another perſon. He

(*b*) Book xxxv. tit. 1, l. 72, S. 6.

had certainly done this lady the groſſeſt injury a man can do to a woman, and I am called upon now to determine, whether the law of *England* will permit this legacy to be claimed by him. Under theſe circumſtances I am warranted to make a precedent, and to determine, *that wherever a legacy is given to a perſon, under a particular character, which he has falſely aſſumed, and which alone can be ſuppoſed the motive of the bounty, the law will not permit him to avail himſelf of it*, and therefore he cannot demand this legacy. A caſe ſomething like this occurred lately, which took up ſo much time before the Lords Commiſſioners, upon an application for a writ *de ventre inſpiciendo* againſt a woman who had lived with Mr. *F.* and had made him believe that ſhe had been brought to bed of ſeveral children, which he was weak enough to ſuppoſe his own. It was not a queſtion whether they were his children, for if ſo, I do not apprehend, the decree would have been ſuch as it was. But there were no ſuch children. She had ſhewn him children as hers, which were not hers, and he gave legacies to them as her children by him. It was held that they were not intitled. [*Ex parte Wallop*, 4 Bro. CC. 90.] There two things were wanting; the teſtator was not merely deceived as to their being his children, but he was deceived as to the other ingredient of the character in which he gave them the legacies, for they were not the children of that woman. Therefore upon the principle I have mentioned from the *digeſt*, and that ought to govern courts of juſtice, I am of opinion this legacy could not be claimed."

The word "children," bearing a co-extenſive meaning with "iſſue," may comprehend under its general import *grand-children, great grand-children, &c.* and for the ſame reaſon a bequeſt to grand-children may embrace great grand-children, &c. though it ſeems that this conſtruction is only given to thoſe words upon the authority of the general intention, and *ut res magis valeat quam pereat.* Thus in a caſe where—

(*c*) *A.* in 1695, made a voluntary ſettlement, and limiting the real eſtate to himſelf for life, remainder to truſtees for 500 years, to raiſe money for payment of his debts, remainder to his nephew *John*, for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and every other ſon of *John*, in tail male, remainder over in default of ſuch heirs male to four perſons, (three of whom were his ſiſters, and the fourth a daughter of a deceaſed brother) and their heirs, in truſt, that they or the ſurvivor, or heir of ſuch ſurvivor ſhould ſell the premiſes, as ſoon as convenient, and divide the money

(*c*) Wyth *v.* Blackman, 1 Veſ. 196, reported in Ambl. p. 555, by the names of Wythe *v.* Thurliſton.

together with the meſne profits, equally between them, naming them particularly, or the reſpective iſſues of their bodies, in caſe they, or any of them, ſhould happen to be dead at the time of ſuch failure of iſſue male of *John*, ſhare and ſhare alike, viz. to each of them, or their reſpective children, one fourth part thereof: provided that if any of them ſhould happen to be dead without iſſue, when there ſhould be ſuch a failure of iſſue of *John*, then to be equally divided among the ſurvivors or their reſpective children, in caſe any of them alſo ſhould be dead, leaving iſſue of their bodies. After the teſtator's death, his nephew *John*, then but eight years old, enjoyed the eſtate, which came into poſſeſſion upon the debts being paid off, till 1744, when he died without iſſue: at whoſe death none of the four perſons were living; the niece having died without iſſue: but of the three ſiſters; by *C.* there were children then living; by *W.* children and great grand-children; by *B.* there were only grand-children, and no children then living. The bill was brought by the ſurviving children of *C.* and *W.* to have the whole divided into moieties, in excluſion of the grand-children of *B.* and of the great grand-children of *W.* And by Lord *Hardwicke*, C. "This is a very particular caſe, and an extraordinary limitation and diſpoſition of a real eſtate: but the court muſt make ſuch a conſtruction as appears agreeable to the intent of the donor and creator of this truſt. Whatever doubt there may be on this caſe, whether to be taken as real or perſonal, (of which I have great doubt) yet as all parties ſubmit to have it conſidered as perſonal eſtate, not of the original donor, but of the reſpective perſons who were to take under him, and as it is for the intereſt of the defendants the infants to have it ſo taken; and as it will rather tend to ſupport my opinion, even though any other ſhould take it as real; I will conſider it as money. The firſt queſtion is, whether theſe children of two of the ſiſters are intitled to have the whole of this eſtate divided into two ſhares among them? or whether the grand-children of the other, and the great grand-children are intitled to a ſhare with them? which will turn principally on the conſtruction of the words *iſſue* and *children*, in this declaration of truſt. Whether *iſſue* is to be reſtrained and abridged by *children*, or *children* enlarged and extended by *iſſue*. To pave the way for the conſtruction of this truſt, his intention ſo far as it can be collected, muſt be conſidered. And firſt, it ariſes clearly, that though he might have in view and expectation that this truſt might be executed at no great diſtance of time; he had in view alſo, that it might riſe and take effect at a very great diſtance; by the limitations to the ſons of *John*, continuing ſeveral years, ſo that there might be no poſſibility of theſe ſiſters being then living, as appears throughout the whole, and ſhould not there-

fore be confined to a speedy failure of issue male. His next general intent was clearly, after failure of the issue male, and these remainders taking place, to make a provision not only for the sisters, if living, but for the several stocks and branches out of this trust; if the construction for the defendants prevail, it answers that intent; whereas that for the plaintiffs narrows it to the children of the sisters, and if the failure should happen at the end of 100 years, when the sisters and all their children are dead, all their descendants would be thereby cut out, and the trust would result to the heir at law, which would certainly be contrary to the intention to provide for their stocks: then consider, how the words are capable of a construction to answer this intention. If it rested on the word *issue*, there is no doubt, being a description taking in all *issues in infinitum*; although not in notion of law as estates tail, but as purchases by description, being issue of the body; and there is no difficulty in the thing, the division being very easy and natural among them. The great objection to this is from *videlicet*, that being an explanatory clause, it restrains *issue* to *children*; but that was not the donor's meaning, which was, as said for the defendants, principally to explain the shares thereby; although he might mean both. A difficulty might have occurred to the drawer, that one might die, leaving three or four children or grand-children, who might be construed to come in *per capita*, to have equal shares of the whole with the surviving sisters: to avoid which doubt he explains, that the issue or children of the deceased should take only the share of the deceased. In *Wild*'s case, 6 Co. and in *Bend.* 30, it is settled, that children bear a co-extensive sense with issue. Then why should not the court take this to be so, if it more fully answers the intention of the donor who created this trust, which might take effect at a distance of time? But the proviso is decisive, under which the plaintiffs claim and must bring themselves within the contingency put there, which not having happened, as *B.* leaving grand-children living, did not die without issue, it cannot be divided into two shares only; for the death of the niece without issue, will only warrant a division into thirds: and the donor understood, when a person is dead without issue; for by failure of issue male of *John*, he meant failure of descendants of his body generally, not of sons and children only, and has used the words in the same sense. Here *issue* and *children* are again used in a general collective sense *in infinitum*. According to the authorities, grand-children and great grand-children, are all children, and come within that to certain purposes. And in 2 *Vern.* 106 (*d*), it is said in the conclusion, that it is allowed by all, if no children are in being,

(*d*) Crooke *v.* Brookeing, *infra*.

grand-children would come in under the word *children*, and may be thereby described, which is sufficient for the present purpose. This makes the construction consistent with the donors' intent to provide for the execution of the trust at a distance of time, and for the several stocks, who would be unprovided for, if restrained. An inconvenience is urged, from its being to be divided among a great number, splitting the property which may not be for their advantage, nor according to the donor's meaning. He has made a provision for such right of representation, as the *statute of distribution* allows among collaterals, brothers and sisters children, considering the sisters and niece as collateral among themselves, (as they were), and it has been held brothers and sisters of the intestate: But that objection holds not on the foot of the intent, which lets in the niece and her children, going one degree beyond the right of representation allowed by the statute, by which grand-children of brothers or sisters are excluded. But the question here is, not of the personal estate of the donor, but of those who were to take under it; and then not to be considered on the foot of a collateral, but lineal succession, which may go *ad infinitum*; for according to the first clause of the statute all the stocks are to take, and the representation to go on *pro suo cuique jure* to the great grand-children representing their respective parents, and so not more inconvenient than in cases arising on that statute. The word *children*, therefore must be explained and extended to *issue*, and if the grand-children prevail, then the great grand-children must be let in. But the question is, whether they should take *per capita*, or *per stirpes*? But the authority of the settlement has shewn in what manner; *per stirpes* as to the stock, *viz.* that which would have belonged to each sister if living, to go to their respective issues, but to be divided *per capita*, among themselves, as according to the statute of distribution in lineal succession. Nor is there any objection or inconvenience from their taking *per capita*, and *per stirpes* at the same time." Again—

(e) *H. M.* having four daughters, by his will in 1754, gave certain freehold and copyhold estates, and a quarter part of the residue of his personal, to his daughter *B. M.* for life, remainder to all the children of her body, both sons and daughters, equally to be divided among them as tenants in common, and to their several and respective heirs, with benefit of survivorship, in case any of the sons dying under 21, or daughters before 21, or marriage, and in default of such issue, then to and among all his other daughters that should be living at the time of the death and failure of issue, of his daughter *B. M.*

(e) Gale *v.* Bennett, Ambl. 681.

and the *child or children of his other daughters as ſhould then happen to be dead*, as tenants in common in fee-ſimple. But he declared that the children of any of his deceaſed daughters, ſhould only have their mother's ſhare divided among them. And if there ſhould be none of his other daughters, nor any *iſſue* of his other daughters then living, he then directed that the premiſes ſhould go to his own right heirs. *B. M.* died in the year 1762, without iſſue. *C. G.* one of her ſiſters, died in her life-time, leaving two grand-children, but no children living at the death of *B. M.* *M. B.* another ſiſter, ſurvived *B. M.*; and *E. P.* another ſiſter, died before *B. M.* leaving two children, who were alive at *B. M.*'s deceaſe. Queſtion, whether, according to the true conſtruction of the will, the limitation over, upon the death of *B. M.* without iſſue, was to be confined to the ſurviving ſiſter, and the children of the deceaſed ſiſter, in the ſtrict ſenſe of the word children, or whether it comprehended the grand-children of *C. G.* ſhe having no children living at *B. M.*'s death? And it was inſiſted for the grand-children, that the word, "Children," ſhould extend to grand-children, where there were no perſons to anſwer the deſcription of children, and that the teſtator meant to let in the grand-children, having uſed the word, "*iſſue*," as ſynonimous with children, and the laſt caſe was cited as an authority. And Lord *Northington*, C. was clearly of the ſame opinion, and declared, though he permitted a few days to elapſe before he made the decree, that he did not do ſo from any doubt in his mind, but from a deſire to look into the caſe cited; which he ſaid was directly in point;—And in another caſe—

(*f*) *A.* by his will gave *inter alia*, the following legacies, "I give unto the children of *William Hunter*, late of, &c. that is to ſay to captain *John Hunter* of, &c. 2000l. and to his iſſue; to his ſiſters, or their iſſue, 1000l. each, *viz.* the iſſue of his ſiſter *Mable*, deceaſed; Mrs. *Elizabeth Holt*, wife of *John Holt*, eſq. now of, &c.: if Mr. *Holt* ſhould ſurvive her, I will that he have the intereſt of that ſhare for life, at his death, to the ſurviving children of the ſaid *William Hunter*: Mrs. *Mary Davenport*, wife to the rev. Mr. *Davenport*, in, &c. and to Mrs. *Roſana Dixon*, wife to Mr. *Dixon*, printer, in, &c. the whole ſum to the ſaid Captain *John Hunter*, and his iſſue, and to his ſiſters, and their iſſue, amounting to 6000l.; if any lapſe, to be divided among the ſurvivors." *Elizabeth Holt*, having ſurvived her huſband, died without iſſue, in March 1788, before the teſtator, who died in April, 1791. *Roſana Dixon*, died in March, 1789, leaving one child by her firſt

(*f*) Royle v. Hamilton, 4 Veſ. Jun. CC. 437.

marriage, and four by her ſecond. And one of the queſtions was, whether thoſe children, as the *grand-children* of *William Hunter*, were intitled to a ſhare of *E. Holt*'s legacy of 1000l. though not the *children* of *William Hunter*, in the ſtrict and literal ſenſe of the word? And the *Maſter of the Rolls*, "Upon the beſt conſtruction that I can put upon this blind clauſe, it is clear, that when the teſtator ſpeaks of the children of *William Hunter*, explaining that afterwards to mean them and their iſſue, he meant, that if any of them ſhould be dead, their children are *perſonæ deſignatæ*, to ſtand in their place. The word, 'Children,' certainly would not mean grand-children, unleſs the parent of thoſe grand-children, who is the object of that deſcription, is dead, but it is plain, he meant to embrace iſſue beyond the firſt generation. It is ſaid that where he mentions the ſurviving children of *William Hunter*, he muſt mean children ſtrictly: but upon the latter part of the clauſe it is perfectly plain, he meant juſt what he did before: 'The whole ſum to the ſaid Captain *John Hunter*, and his iſſue, and to his ſiſters, and their iſſue, amounting to ſix thouſand pounds; if any lapſe, to be divided among the ſurvivors:' the ſurvivors of whom? of all thoſe perſons to whom he had given it. By 'Children,' he means the deſcendants. Where he ſpeaks of ſurviving children, he means children, as he meant before. The other conſtruction would involve this abſurdity, that if none of the children had ſurvived Mrs. *Holt*, he would have died inteſtate, a conſtruction the court always endeavours to avoid. I found myſelf upon theſe words, "the whole ſum to the ſaid Captain *John Hunter*, and his iſſue, and to his ſiſters, and their iſſue, &c." The decree, therefore, was in favour of the grand-children.

(g) T. having ſeveral grand-children, and great grand-children, bequeathed to *L. N.* and her ſiſter Mrs. *H.* (two of her grand-children,) 100l. each, to buy rings, and directed her executor to give the reſidue of her perſonal eſtate, to ſuch perſons, and in ſuch manner, as ſhe by writing, under her hand, ſhould appoint. By a codicil, ſhe gave legacies to ſeveral of her great-grandchildren, and to Lady *D.* the widow of her grandſon. She alſo directed that the 100l. given to *L. N.* and Mrs. *H.* ſhould be paid out of her effects, in Ireland, and gave to Miſs *H.* (who was her great-grand-daughter,) her Indian ſkreen, with all her china, in London: and in another part of her codicil, ſhe gave the china in a ſmall Indian trunk, &c. to her *grand-daughter*, Miſs *H.* And if her effects ſhould be more than ſufficient to anſwer what ſhe had given, ſhe deſired that they might be divided *among her grand-children, named*

(g) Huſſey *v.* Lady Dillon, Abl. 603.

therein. Two of the queſtions were, whether the great grand-children ſhould take a ſhare of the reſidue, under the deſcription of grand-children? And whether Lady *D.* who was only a grand-child, by marriage, ſhould take under that deſcription? As to the firſt, Lord *Henley*, C. ſaid, that *grand-children* was a word of large extent, and in common parlance took in every body deſcended from the teſtator, and would have that effect, unleſs the intention appeared to the contrary. In this caſe, ſhe had called the great-grand-daughter Miſs *H.* by the deſcription of grand-daughter, which was deciſive of the queſtion. As to the ſecond queſtion, he obſerved, that there was no colour to ſay Lady *D.* was to be conſidered as a grand-child, ſhe being ſo by marriage only, and the teſtatrix meant ſuch as were her grand-children by blood.

Although it be clear, from the authorities laſt ſtated, that grand-children, &c. may claim, under a bequeſt to children, and great grand-children, &c. under the deſcription of grand-children; yet, as this conſtruction is merely allowed to effectuate the intention of teſtators, if there be any perſon who can literally anſwer the terms of the bequeſt, grand-children, great-grand-children, and relations in a more remote degree will be excluded. Thus in a caſe where—

(b) A. bequeathed 1500l. to truſtees, in truſt to allow *A. C.* a maintenance out of the profits during her huſband's life, with a power for *A. C.* to diſpoſe of the principal, if her huſband died before her, but if he was the ſurvivor, then he directed the money to go among her ſiſter's children, as ſhe ſhould adviſe. *A. C.* died in the life of her huſband, having only one ſiſter *G.* and without giving any advice or directions, as to the 1500l. *G.* had only one child living at the death of *A. C.* but had five other children living at the teſtator's death, who ſeverally died inteſtate, ſome of them leaving children. The queſtions were, whether the only child of *G.* living at *A. C.*'s death, ſhould have the whole 1500l.? or whether the adminiſtrators of the dead children were intitled to ſhares of it? or whether the grand-children, *viz.* the children of the dead children, had not that right? And Lord *Jefferies*, C. decreed the 1500l. to be divided between the only child of *G.* living at the death of *A. C.* and ſuch of the grand-children as were living at that time. But upon a re-hearing before the Lords *Commiſſioners*, they decided in favour of the only child of *G.* who was living at the death of *A. C.* and ſaid, the only difficulty in the caſe was the word, "Children," and there was but one child, and were clearly of opinion, that where the deviſe was to "children," grand-children could not take with the chil-

(b) Crooke *v.* Brooking, 2 Vern. 106.

dren. But they admitted, that if there had been no child, the grand-children might have taken under the bequeſt to children. Again—

(i) M. F. by his will, made the following diſpoſition, "I give to my wife, *T. F.* the intereſt and dividends of 5000l. 4 per cent. Bank Annuities, for the term of her natural life; which 5000l. I direct ſhall be continued in the ſame ſtock, and then to be ſhared equally, ſhare and ſhare alike to my children that ſhall be then living. Alſo I give to my aforeſaid wife, my leaſehold houſe and premiſes, now in my poſſeſſion, in the pariſh of, &c. for the term of her natural life, and then to be let to the beſt advantage, during the time of the leaſe to come, and the neat produce thereof to be equally placed in the ſtocks, for the benefit of my *children* that ſhall be then living, equally, ſhare and ſhare alike." The teſtator at his death, left his widow ſurviving him, alſo four daughters, *B. C. D.* and *E.* all married, and having children. *B.* had two children, one of whom *F.* having attained 21, and married, died in 1792. *B.* died in 1794, and the teſtator's widow in 1797, leaving her other three daughters ſurviving: and one of the queſtions was, whether, as *B.* died before the teſtator's widow, her ſurviving child, the grand-child of the teſtator, could claim any part of the 5000l. 4 per cent. Bank Annuities, and any of the produce of the leaſehold houſe and premiſes, given to the *children* of the teſtator, who might be living at his wife's death, there being children properly anſwering the deſcription at the laſt mentioned period? And the *Maſter of the Rolls* determined that the grand-child was not intitled to a ſhare of the above property, with the ſurviving children of the teſtator, and ſaid, "that children may mean grand-children, where there can be no other conſtruction, but not otherwiſe."

The term "iſſue," is of very extenſive import, and when uſed as a word of purchaſe, will compriſe every one who can claim, as deſcendants from or through the perſon to whoſe iſſue the bequeſt is made. Thus—

(k) A. bequeathed "to *M. D.* or her iſſue," a legacy, or ſum of money. *M. D.* died in the life of the teſtator, leaving a ſon, an only child, and two grand-children, the children of a deceaſed daughter. The queſtions were, firſt, whether the grand-children were intitled with the ſon, and if ſo, ſecondly, whether they ſhould take *per capita*, or *per ſtirpes*? And by the *Maſter of the Rolls*, "This cauſe depends intirely upon the conſtruction of theſe words, 'to *M. D.* or her iſſue,' I apprehend, there is no doubt, that the word, 'iſſue,' has ever been conſidered as embracing other objects than children;

(i) Reeves v. Brymer, 4 Veſ. Jun. CC. 692. *(k)* Davenport v. Hanbury, 3 Veſ. Jun. CC. 257.

and the only remaining question is, whether they are to take *per capita* or *per stirpes*. It was contended, that though that embraces all, they shall not take *per capita*; but the fund must be divided according to the stocks, from which they are derived; and for that purpose *Wythe* v. *Thurlston*,(*l*) was cited as a decision by Lord *Hardwicke*, that under similar words, 'issue' was held to comprehend all the descendants; but they were to take *per stirpes*. It is very shortly reported by *Ambler*; therefore I thought it necessary to look very accurately into the register's book; from which I stated the case, when this cause came on before. When that is considered, the authority of that case does not, in any degree, militate against my opinion; and I repeat it, that it may not be supposed Lord *Hardwicke* meant to lay down, that the word, 'issue,' would not comprehend all the descendants, and that they would not all take either as joint-tenants; or if the words, 'equally to be divided,' were added as tenants in common. It was upon the particular words of that case, that Lord *Hardwicke* confined the distribution to their rights, *per stirpes*. That case was followed by *Gale* v. *Bennet*, Amb. 681 (*m*); in which Lord *Northington* relied much upon the former decision. In those two cases Lords *Hardwicke* and *Northington* were of opinion, that all the issue should take; but not *per capita*, but *per stirpes*: but those determinations arose from the peculiar words giving the fund first to the children, then, in failure of all issue, over to third persons. That leaves the question, as to the import of the word 'issue,' exactly, as if those cases were not determined; and I am now to determine upon the word 'issue.' When used as a word of purchase, it has always been considered as synonimous to, and the same as, 'descendants;' and whoever can make himself out a descendant of the person, to whose issue the bequest is made, has a right to be considered as *persona designata* in that bequest. The very case occured before Lord *Thurlow*; *Butler* v. *Stratton*, 3 Bro. CC. 367 (*n*), where upon the word 'equally,' they were held intitled in common; therefore I must suppose, if the word 'equally,' had not been added, they would have taken as joint-tenants. The word 'issue,' therefore, there being no particular words in this will, as there were in the two cases before Lord *Hardwicke* and Lord *Northington*, embraces all the descendants, and as there are no words of severance, nor any thing to shew he meant they should take, not in their own rights, but as representing others, the son and the children of the daughter must be considered as *personæ designatæ*, and will take as joint-tenants."

(*l*) *Supra*. (*m*) *Supra*. (*n*) *Infra*.

Although the word, "iſſue," in the abſtract, be conſidered a word of a very extenſive meaning, yet when it can be collected from the will, that the teſtator in uſing it, did not intend that it ſhould be taken in its common acceptation, the import of it will be confined to the objects intended to be defined by it. Thus, in a caſe where—

(o) Lands were deviſed to *J. H.* and *M.* his wife, for life, and after the death of the ſurvivor, to truſtees, to ſell, and apply the produce among all and every the iſſue, child or children, male or female, of the body of *J. H.* by the ſaid *M.* his wife and their repreſentatives, equally. At the death of the ſurvivor of *J. H.* and *M.* his wife, there were ſeveral children living, one of whom having ſurvived the teſtatrix, died in the life-time of the ſurvivor of her parents, having firſt married and left children, and her huſband adminiſtered to her, claiming in her right. There were alſo other grand-children of *J. H.* and *M.* his wife, who claimed ſhares of the bequeſt, as iſſue of *J. H.* and *M.* Queſtion, which claſs of claimants was intitled? And the *Chancellor* thus expreſſed himſelf, "If the teſtatrix had uſed 'iſſue,' in the common ſenſe, all the iſſue of *H.* and his wife, would have been intitled. She has defined the iſſue that ſhall take, a child or children of *J. H.* and *M.*, which I ſhould think muſt be thoſe, that would be intitled to take at the time of her death. Then the poſſibility of its coming at a very remote period occurred, and that ſome of the children, who might be capable of taking, might die in the life of their parents, and then ſhe throws in the word, 'repreſentatives.' What I go upon, is, that I think 'iſſue,' is not an idle word, it qualifies the word, 'repreſentatives.' She explains what ſhe means by the general word children and their repreſentatives being 'iſſue.' Again—

(p) *A.* by his will bequeathed as follows: "Thirdly, I will that my ſaid truſtee, whom I do appoint my ſole executor, do within three months after my deceaſe, transfer 1000l. ſtock in the public funds, commonly ſtiled the 3 per cents. conſolidated, to each of my relations, hereafter mentioned, *viz.* to *T. J. R.* and *M.* the ſons and daughter of Mr. *T. Dixon*, or *Dixon* and *Elizabeth* his wife, late of *H.* in the county of *C.* if they be living at the time of my deceaſe; and if all or any of them ſhall die before I do, then I will that the *lawful iſſue* of every one of them, ſo dying before me, ſhall ſhare and ſhare alike, have and enjoy that 1000l. ſtock, which their reſpective parents, if living, would have had and enjoyed. Fourthly, I give and bequeath unto *John*, the ſon of *R. Dixon*, or *Dixon*, late beer-brewer, of the ſaid city of C. and of *Elizabeth*, his wife,

(o) Horſepool *v.* Watſon, 3 Veſ. Jun. CC. 383. *(p)* Sibley *v.* Perry, 7 Veſ. Jun. CC. 522.

1000l. ſtock, as aforeſaid, if living at the time of my death, and to his *lawful iſſue*, ſhare and ſhare alike, if he the parent ſhould then be dead. Fifthly, I give and bequeath unto my brother, Mr. *J. Griffith*, 20l. ſterling, and my wearing apparel, and alſo an annuity of 50l. a year, during the term of his natural life, to be paid him by two equal half-yearly payments of 25l. during his life. And I will that ſo much capital ſum be kept in the ſame public fund of 3 per cent. conſols, that the dividend half-yearly thence ariſing, will regularly and conſtantly allow him 25l. ſterling, every half year during his life, and I will have the firſt half-yearly payment to commence, &c. Sixthly, I likewiſe give and bequeath to my brother-in-law, *G. Ramſey*, of, &c. 150l. ſtock, as aforeſaid, for mourning, for himſelf and wife. Seventhly, I give and bequeath to each lawful iſſue, who may be alive at the time of my death, of my father's ſiſters, whoſe names were *Martha*, *Mary* and *Rebecca*, and who married perſons of the names following, &c. to each of them, I ſay, then living, and *lawful iſſue*, I give and bequeath 140l. ſtock, as aforeſaid. Eighthly, I give and bequeath to *each of the lawful iſſue*, and alſo to the widow of the late rev. *T. Denſon*, late curate of, &c. 130l. ſtock, as aforeſaid, if living at my deceaſe. Ninthly, I give and bequeath to each of the *lawful iſſue* of Mr. *R. Denſon*, late of, &c. who may be living at the time of my deceaſe, 120l. ſtock, as aforeſaid. Tenthly, I give and bequeath to Captain *A. Gibbs*, of the royal navy, and *F.* his wife, and likewiſe to each of their children, who may be living at the time of my deceaſe, 140l. ſtock, as aforeſaid. Eleventhly, I give and bequeath to Mrs. *C. Rodd*, the widow of the late rev. *J. Rodd*, Rector of, &c. and alſo to each of her daughters, (naming them,) 130l. ſtock, as aforeſaid, to each who ſhall be living at the time of my deceaſe, and likewiſe 50l. ſtock to *Joſeph*, the ſon of the rev. Mr. *Somerſcales* and *F.* his wife, both of which are deceaſed. Twelfthly, I give and bequeath to Mrs. *F. Dayrell*, the wife of, &c. if living at the time of my death, 130l. ſtock, as aforeſaid. Thirteenthly, I give and bequeath to Miſs *S. Stubbs*, the particular friend of my late dearly beloved daughter, who now lives with, &c. 400l. ſtock, as aforeſaid, if ſhe be living at the time of my deceaſe. Fourteenthly, I give and bequeath to each of the daughters of the rev. *J. Sibley*, my truſtee and executor, who ſhall be living at the time of my death, 120l. ſtock, as aforeſaid." The queſtions were, what perſons the teſtator meant to compriſe by the word, 'iſſue,' for it ſeemed that if it extended to perſons more remote than children, the perſonal eſtate would be exhauſted; and whether the legacies of ſtock were or not ſpecific? And by Lord *Eldon*, C, "I have not the leaſt doubt, the actual intention of this teſtator, was to give ſo much ſtock as he ſpecifically

had to persons under the word, 'issue' meaning children. But upon the authorities, and considering what might have been the case, if he had made any change whatever in the nature of the property, it is extremely difficult to put any other construction upon it, as a judge, than that which, as an individual, I have no doubt was the meaning. The testator contemplates the case of persons, of whose existence or non-existence he was not sure, giving to them in the first place; and if they should not be living at the time of his decease, he substitutes other persons in their place; and upon all the authorities it must be admitted, that if in the third clause, the words 'respective parents,' were not inserted, the words, 'lawful issue,' must be extended beyond children. He gives first 10001. stock, specifically: so that the legacy would fail, if he should sell out the stock; though nothing could be more contrary to his actual intention than that, if he had sold out the stock, and placed the money upon a mortgage, the legacy should have failed. I have no doubt in private, that directing a transfer of stock, he means to give what he has; but there is no case deciding, that it is specific, without something marking the specific thing, the very *corpus*; without describing it as standing in his name, or by the expression, 'my stock,' &c. *(q)*. Here you must determine each legacy to be specific, before you can raise the argument; if it is admissible. Unless I can do that, unless I can say, his intention was, that the legacy should fail, if the stock was parted with, I cannot say, he meant the one or the other, because he happened to have so much stock at the date of the will; for otherwise there is no legal ground for that construction. In the clause I have already referred to, it is fair to put the ordinary sense upon the word 'parent;' *viz.* father or mother; and there the word 'issue,' means children. That is the more strong upon the next clause; in which it is clear, he did not mean grand-father, by the expression, 'if the parent should then be dead.' Upon the fifth clause, directing, that so much capital be kept in the same fund, it was argued, that this legacy, at least, was specific. I am not aware judicially, that it is sufficient, even for that legacy; for there is nothing more in these words, than in the expression, 'do transfer,' in order to keep. The inclination of courts has been indulged to such an extent, in order to prevent legacies from being disappointed in substance, and they have been so anxious to procure the legatees the bounty, in some cases, that they have construed words, giving the specific *corpus* as a direction to purchase that thing; but if this clause would necessarily make this specific, suppose he had changed his property,

(q) See chap. on specific legacies, and the authorities stated.

and left no more than that ſtock; the court would have been much tortured in ſaying, that becauſe upon this particular expreſſion, this bequeſt is ſpecific, therefore all the others are ſpecific; not upon expreſſions contained in them, but by reference to this particular legacy; when that inference would have deſtroyed, under thoſe circumſtances, every other bounty contained in the will. Therefore, I do not think, if he had changed his property from the funds to mortgage, all the reſt would have failed; which muſt be the neceſſary conſequence, if they are ſpecific. It is not to be forgot, that in all probability the children might be as old as himſelf. Upon all the caſes, this word, *prima facie*, will take in deſcendants beyond immediate iſſue. But, on the other hand, there is no denying, (not applying to the ſtate of the fund, or the number of perſons,) that, if, upon fair reaſoning deduced from the words of the will, all the contents, and the deſign and tenor of it, as manifeſted by its contents, ſhew it was meant, in the more reſtrained ſenſe, that ſenſe may be given to it. The clauſes of this will, to which I have referred, ſhew, the teſtator was likely to uſe the words, 'lawful iſſue,' as deſcriptive of children only; and the queſtion is, whether upon the whole will taken together, he did uſe them in that ſenſe. Obſerve the tenor and deſign of the will, It is to give to perſons living, whom, in ſome inſtances, he ſtates, and in others, conjectures, to be living, certain funds, if they ſhall be alive at his death; and, if dead, to ſubſtitute their iſſue, that is, children in their room. Then he takes up the caſe of thoſe he conſiders dead; and gives to their lawful iſſue. Is it a ſtrain beyond what the court may go, in the conſtruction of the will, upon all its parts, to ſay, that ſubſtituting children under the words 'lawful iſſue,' in the room of thoſe he knew, and of thoſe he conjectured to be dead, but whom he would not paſs over, as they might be living, where he treats the parents as dead, he meant the ſame by the ſame words? If that can be ſupported upon this will, it applies alſo to the legacy, to the iſſue of *Thomas Denſon*; and though a ſmall circumſtance, it is not immaterial, that the gift to the iſſue is connected with that to the widow. I take the will to mean, that in general he meant to give to children, that he has given to children, *eo nomine*; that he has given to children under the name of daughters, and by the terms of 'lawful iſſue,' and that in different parts, as to many of the legacies, he has conſidered 'children, daughters,' and 'lawful iſſue,' ſynonimous. Then does ſo much of the will, upon the face of it, furniſh a fair ground for ſaying, that as to two or three particular legacies, he meant what in every other part of the will he meant by thoſe terms? Upon the whole will, I incline to the opinion that he meant children.

I have ſtated the grounds of my opinion, as I ſhould be extremely ſorry if this caſe had paſſed with as little obſervation as was near being thrown upon it, for at laſt I have not ſo much confidence in my opinion, to have altered the contrary determination, if it had come before me upon appeal. Caſes of this kind, conſidering the precedent authorities, ought not to paſs without obſervation. This deciſion is not right, unleſs upon the conſtruction furniſhed by the different parts of this will. I lay no ſtreſs on the ſtate of the fund, or the number of perſons; as to the firſt, for this reaſon; that before I could raiſe the queſtion, I muſt determine whether theſe are ſpecific legacies, or not: if not, and I am to reſort to the ground that has been taken, that then the teſtator muſt have a very large fortune, there is great difficulty in reconciling the judgment upon that principle to decided caſes, for as to that there is no difference between this and *Andrews* v. *Emmet*, 2 Bro. CC. 297. It was there argued, that the teſtator had not property enough without that, which was the ſubject of the power, and therefore he muſt have intended to comprehend that: No, ſaid the Court, you cannot go into that, you cannot enquire into the ſtate of his property at the date of the will, his expectations, &c: the will not being to operate till a future time, there would be no end of it. So, in this caſe, if, upon the face of the will, he muſt be held to have given general legacies of ſtock, it muſt be ſo; and whether he had money to buy it or not, cannot be taken into conſideration, upon the conſtruction of this will, for where a perſon is to pay abſolutely out of what is given to him, it ſignifies very little, whether what he is to pay, is more or leſs, and whether the eſtate is large or ſmall, for he may die before he has received any thing. Another caſe before Lord *Mansfield* was thought pretty ſtrong, where it was decided, that you are to inquire into the value to determine what is the limitation: but there the teſtator having recited that he meant equally valuable intereſts to each of the deviſees, that recital juſtified the court in looking at the value of the intereſt given to one, in order to determine how extenſive the intereſt of the others ſhould be, whether it ſhould be equal to the value of that which, in clear and unambiguous terms, he had given to one. I ſhall expreſs the ground of my opinion in the declaration;—Declare that, upon the true conſtruction of this will, and the whole of it taken together, the teſtator, by the words, 'lawful iſſue,' in theſe clauſes, meant, 'children,' and the diſtribution ſhall be accordingly." His Lordſhip alſo determined that the legacies of ſtock, for want of words of reference, were general legacies, and not ſpecific.

It was determined by the *Maſter of the Rolls* in the caſe of *Mayet* v. *Mayet* (*r*) that couſins once removed, and a grand-niece were included, and ſhould take under a bequeſt to the "firſt and ſecond couſins" of the teſtator.

In caſes where legacies are given to a part only of a number anſwering the ſame deſcription, but none of them is particularly named, the court of chancery has not quaſhed the bequeſt for uncertainty, but rejected the words creating it, and admitted the whole number of perſons anſwering the deſcription to participate equally in the bequeſt; accordingly, if a legacy were given to the *three* children of *A.* and *A.* had *four*; the court would reject the word "three," and admit all the children of *A.* to take equal ſhares of the legacy.

(*s*) *A.* bequeathed thus, "I give and bequeath unto the *two* ſervants that ſhall live with me at the time of my death, 100l. new South Sea ſtock, to be equally divided between them." The teſtatrix had only *two* ſervants when ſhe made her will, but ſhe afterwards took *another* who lived with her to the period of her the teſtatrix's death. And by Sir *Thomas Clarke*, M. R. "As to the ſervants, ſuppoſe the teſtatrix had four ſervants, and had ſaid, 'I give to *all* the *three* ſervants living with me at my death' I think all the four would be entitled to a ſhare; the indefinite word *all* would have warranted the court to have rejected the word *three* as repugnant, for ſhe ſeems to me to have no particular perſons in view. Here, if theſe three ſervants had left her, and ſhe had taken two or three others in their room, thoſe new perſons would have excluded the others before, becauſe they anſwer in general the deſcription of the perſons for whom ſhe deſigned that bounty. Then by analogy of reaſon, it ſhould be ſo in this caſe; the words, *the two*, being as inconſiſtent as in the caſe I put of the word *all*, &c. *Ut res magis valeat* it muſt be determined in that way, otherwiſe the bequeſt is void for uncertainty, becauſe it is impoſſible to diſtinguiſh which two ſhe meant. But there is a caſe running *quatuor pedibus* with this, *Tomkins* v. *Tomkins*, in 1745. (*t*), where a teſtator gave to his ſiſter 50l. and to her *three* children 50l. apiece; ſhe had in fact, *four* children; the words were as indefinite, and intended to take in all, as if he had ſaid *all* his ſiſter's children, and the parties were diſpoſed to let them in. Lord *Chancellor* ſaid, if that had not been agreed, his opinion would have been ſo, and relied much on the argument, that otherwiſe it would not be for the benefit of the perſons contending, as it would tend to give the legacy to the reſiduary legatee. Living with her at the time of her

(*r*) 2 Bro. CC. 125. (*s*) Sleech *v.* Thorington, 2 Veſ. 561.
(*t*) Cited in Caſtledon *v.* Turner, 3 Atk. 257.

death, is the circumſtance of her bounty, and if ſhe had taken two more, I ſhould think upon the aforeſaid reaſoning, it would be diviſible among the four." Again—

(*u*) *A.* by her will, bequeathed to the three daughters of *T. B.* 10l. each, and made *C.* executrix, who by her will, gave 82l. 3 per cent annuities, the reſidue of 182l. annuities, to truſtees in truſt, to pay the ſame unto and *between* the *two* daughters of *T. B.* in equal ſhares during their lives, and if *either* of them ſhould die, then to pay the whole to the ſurvivor for life; but if both ſhould depart this life, then the whole was to fall into the reſidue, &c. *T. B.* had *three* daughters, and the queſtion was, whether the word *two* ſhould not be rejected, and all the children of *T. B.* permitted to take ſhares of the reſidue of the 3 per cent annuities? The counſel for the third daughter cited the caſes of *Sleech* v. *Thorington*, and *Tomkins* v. *Tomkins*; and by the *Maſter of the Rolls*, "In conſtruing wills, courts ought not to indulge conjecture; it were much better that many wills ſhould be defeated. In this caſe, I am not prepared to control the caſes which have been determined. When rules are laid down, they ought to be ſuch as meet the common ſenſe of mankind. I acknowledge that upon the preſent ſubject, I yield to the authority of the caſes, and not to the reaſon of them, but on the authority of the caſes I muſt declare that all the daughters ſhall take."

When the terms adopted by a teſtator in reference to the objects of his bounty, are ſo large, that the court cannot diſcriminate the particular perſons intended to be benefited, as in inſtances where legacies are given to 'relations' generally or 'to relations by blood or marriage,' or 'to next of kin' (*x*) without particularizing any of them, the court in order to effectuate the intention by giving effect to the diſpoſition, will direct the legacies to be paid to ſuch of the teſtator's relations as would be intitled under the ſtatute of diſtributions (*y*), the court making that act the *rule* and *meaſure* of the diſtribution. But though that ſtatute be the rule which regulates the *degree* in which relations are to take under ſo general a deſcription, yet the will under which they claim will be the guide as to the proportions and ſhares into which they are to divide the fund.

(*z*) *A.* bequeathed his real and perſonal eſtate to *H.* 'for the uſe of his relations.' The teſtator's mother and his three ſiſters, as next of kin claimed to be ſolely intitled under the above deviſe; and it was agreed to be the rule of the court in the conſtruction of ſuch deviſes to relations, that thoſe, who

(*u*) Stebbing *v.* Walkey, 2 Bro. CC. 85. See Hamphire *v.* Pierce, 2 Veſ. 216. *et infrà.* (*x*) 3 Bro. CC. 64. (*y*) 22 and 23. Car. 2 cap. 10. explained by 29 Car. 2. cap. 30. (*z*) Roach *v.* Hammond, Ch. Pre. 401.

by the ſtatute of diſtributions, would be entitled to the perſonal eſtate in caſe the teſtator had died inteſtate, ſhould upon ſuch general deviſes be let in to the ſame proportions of it only, and the Lord *Chancellor* ſaid, he thought it the beſt meaſure for ſetting bounds to ſuch general words, and that it had frequently been ſo adjudged.

(*a*) *B.* gave by his will, 500l. "to the relations of *E. H.* to be divided equally between them." At the teſtator's death, *E. H.* had living two brothers and ſeveral nephews and nieces by another brother. The queſtions were, firſt, who ſhould take by the deſcription of the relations of *E. H.* and ſecondly, in what proportions? It was ſaid, that in the caſe of *Brown* v. *Brown*, Lord *Macclesfield* determined, that the word relations ſhould be confined to ſuch relations as were within the ſtatute of diſtributions, becauſe of the uncertainty of the term. And upon that authority, Lord *King* determined, that no relation ſhould take under the above deſcription, who could not do ſo by the ſtatute of diſtributions. Secondly, as to the proportions ſuch relations ſhould take, whether according to the ſtatute or in a different manner? His lordſhip decided, that as the teſtator had directed the 500l. to be divided equally among them, he could not direct an unequal diſtribution, and therefore decreed, that they ſhould take *per capita*.

(*b*) *C.* deviſed in this manner, "I give and bequeath to all and every perſon and perſons who are *near* relations to me, if any ſuch there be, the ſum of 250l. to be paid them within a year after my deceaſe, and if there ſhould be any ſuch perſon or perſons who are related to me, and do not apply for payment of the ſaid ſum within a year after my deceaſe, in ſuch caſe, I give the ſaid ſum to my two executors." No nearer relations than firſt couſins applied within the time, yet a queſtion aroſe whether *ſecond* couſins ſhould not be included as "near relations." But the *Chancellor* declared, that ſuch relations only as would be intitled to a diſtributive ſhare of *C.*'s perſonal eſtate, by the ſtatute of diſtributions, were within the deſcription of near relations, and intitled to it, therefore he ordered it to be paid to the firſt couſins.

(*c*) *D.* bequeathed thus, "I give 4000l. to my wife for her life, and after her deceaſe, to my own relations who ſhall be then alive." There were ſeveral legacies in the will to firſt and ſecond couſins, and it was in evidence that the teſtator uſed to receive the ſecond couſins with equal kindneſs as the firſt. Therefore, the ſecond couſins claimed equal ſhares with the next of kin. And by Lord *Thurlow*, C. "it would be very

(*a*) Thomas *v.* Hole, Forreſt. 251. (*b*) Whithorne *v.* Harris, 2 Veſ. 527. (*c*) Green *v.* Howard, 1 Bro. CC. 31.

difficult to draw a line in favour of the ſecond couſins againſt thoſe who are more remote." If you once go beyond the ſtatute, it muſt extend to every perſon who can make any claim; it muſt be confined to the ſtatute, that is, to one claſs under it, for the wife cannot claim, the ſtatute providing for her by the name of wife; therefore, ſuch a will is not totally inofficious, for it ſhuts out the wife. When firſt theſe caſes came before the court, the court ſaid, that to avoid inconvenience, the beſt way was to adhere to the ſtatute; probably the firſt caſes were, where the teſtators having exhauſted the perſons whom they meant as objects, intended the reſt for thoſe to whom the law would give it. The court has ſaid in the ſame moment, that the claimants ſhall not always take in the proportions of the ſtatute, but as the teſtator had directed, as where there have been brothers and brother's ſons, theſe laſt took not by repreſentation, but *per capita*. So where the teſtator has ſaid, to relations *according to their greater need*, the court has ſhewn particular favour to one. Here the teſtator certainly knew that the word relations ſignified more than next of kin. The evidence, if admitted, could go no further than to ſhew that he knew this; the ſenſe of the words, as fixed by legal authority, is not to be altered by the language held on any occaſion by the teſtator, or by his behaviour. There is no particularity in this will to alter the ſenſe of the word relations; it muſt be among thoſe entitled under the ſtatute; *Thomas* v. *Hole*, is a ſtronger caſe than this; as it is reported in Forreſter, 251. the bequeſt was to *all the relations*."

(*d*) *E.* by his will, deviſed his real eſtate to *R.* in truſt for his the teſtator's wife for life, and after her death, in truſt to ſell, and then proceeded as follows; "to divide and pay the monies ariſing by virtue of the ſale of his ſaid eſtate to and among all and every ſuch perſon and perſons who ſhall appear to be *related to me only*, ſhare and ſhare alike, and that ſuch perſon or perſons ſhall prove himſelf, herſelf, or theirſelves intitled to the ſame in ſix months after my ſaid eſtates ſhall be ſold as aforeſaid, ſave and except my nephew *J. W.* of, &c. to whom I give one ſhilling only." The claimants were, ſurviving ſiſters of the teſtator, children of a deceaſed brother, and children of ſurviving ſiſters. And it was inſiſted for the children of the ſurviving ſiſters, that the teſtator by excluding the nephew whoſe mother was alive, and who conſequently was not one of the next of kin of the teſtator, clearly meant to include perſons in the ſame degree; but the Lord *Chancellor* ſaid, "the difficulty was, how to conſtrue the word *relations*, but by a reference to the ſtatute of diſtributions. If it were a

(*d*) Rayner *v.* Mowbray 3 Bro. CC. 234.

recent matter, there might be a doubt, but he took the ſtatute to be declaratory of the old law. When once a rule has been laid down, it is beſt to abide by it; we cannot always be ſpeculating what would have been the beſt deciſion in the firſt inſtance; though the diſtribution is deferred to the death of the wife, that does not prevent the intereſts from veſting at the death of the teſtator." And in another caſe;—

(e) F. bequeathed 50l. for a mourning ring 'to each of his relations by blood or marriage.' The queſtion was, what relations were intitled? And it was ſaid, that it muſt be confined, as ſuch diſpoſitions often have been, to the ſtatute of diſtributions, and to thoſe who had married perſons intitled under that act. And the *Chancellor* declared that he had no difficulty in taking that line, though he was not ſure he hit the intention by it, and decreed accordingly.

A diſtinction has been attempted in favour of more diſtant relations than the ſtatute allows, when *poor* or *pooreſt*, *near* or *neareſt* preceded the word "relations," or in favour of particular relations in equal degree; upon this diſtinction an *anonymous* caſe in Peere Williams *(f)* was decided, but the reporter at the foot of it obſerves, that it was a ſtrained interpretation in favour of the relative. Upon the ſame principle, Sir *Thomas Sewell*, M. R. decided in *Brunſden* v. *Woolredge (g)* that by the words "the 500l. ſhould be equally diſtributed among his mother's poor relations" in one will, and by the words "to ſuch of his the teſtator's poor relations as *W.* his heirs, executors, and adminiſtrators for the time being, ſhould think objects of charity" in the other, ſuch relations of the teſtator's mother as were poor and proper objects of the charity ſhould take, without reference to the ſtatute of diſtributions. It ſeems, however, that the above words will not have the effect of taking the bequeſt out of the general rule; for if it be convenient to have recourſe to the ſtatute of diſtribution, when the legacy is given to relations generally, the expediency of its application appears equally manifeſt, when the general deſcription is preceded by the words "poor or pooreſt, near or neareſt" the following caſes ſeem to authoriſe the above obſervations;—

(h) A. by will, bequeathed as follows, "I give and bequeath unto, and I hereby order and direct my executors to pay out of the reſidue and reſt of my eſtate, the ſum of 2000l. to and among ſuch of my *neareſt* relations of the family of *Edge*, as my executors ſhall think the greateſt objects of charity, in ſuch manner and in ſuch proportions as my executors and the ſurvi-

(*e*) Deviſme *v.* Melliſh, 5 Veſ. Jun. CC. 529. (*f*) 1 P. Will. 327. (*g*) Ambl. 507. (*h*) Edge *v.* Saliſbury, Ambl. 70. See alſo Whithorne *v.* Harris, *ſupra*.

vors and ſurvivor of them ſhall think fit, and I do hereby deſire that my executors would take the advice and direction of my ſaid ſiſter *S.* in the diſtribution thereof." The firſt couſins of the teſtator claimed an equal ſhare of the 2000l. with his nephews and nieces, but Lord *Hardwicke*, C. diſallowed their claim, and ſaid, " I will not conſtrue the intention to extend further than to the neareſt relations, ſuch as would take under the ſtatute of diſtributions, otherwiſe it would be endleſs to find out every body who were relations." The firſt couſins having attempted to read evidence that the teſtator meant to comprehend them, his lordſhip refuſed it, becauſe the effect of ſuch admiſſion would be to explain or conſtrue words which of themſelves carried a meaning (*i*).

(*k*) *B.* bequeathed to his ſiſter *G. P.* an annuity of 10l. for life, and after her death he gave the ſame to his own and his then preſent wife's *pooreſt relations* to be diſtributed and paid to them proportionally ſhare and ſhare alike at the diſcretion of his executors. He then gave to another ſiſter *R. K.* a like annuity of 10l. for life, and after her death to his own and his wife's *pooreſt* relations, to be diſtributed equally at the diſcretion of his executors. Queſtion, whether the charity was not confined as to the objects, to ſuch relations as were next of kin according to the ſtatute of diſtributions? The claimants were nephews and nieces, great-nephews and great-nieces, and it was determined that the nephews and nieces only were intitled as being the next of kin.—Again—

(*l*) *C.* by his will, gave the third part of his reſiduary eſtate to be diſtributed among the *moſt neceſſitous* of his relations by the father and mother's ſide. The queſtion was, whether *M. W.* the next of kin, according to the ſtatute of diſtributions ſhould ſolely take, or whether two other perſons in a more remote degree of kindred ſhould alſo be admitted to ſhares. And it was contended for the two perſons juſt alluded to, that the teſtator, by uſing the word " neceſſitous" intended, that more diſtant relations than the ſtatute allowed, ſhould have the benefit of the charity. But by the Lord *Chancellor*, " ſeveral caſes have been cited, all proceeding upon the ſame ground, making the ſtatute of diſtributions the rule to prevent an inquiry, which would be infinite and would extend to relations *ad infinitum*. The court cannot ſtop at any other line. Thus it would clearly ſtand upon the word *relations* only, the word *poor* being added, makes no difference; there is no diſtinguiſhing between the degrees of poverty, and therefore the court has, as was unanſwerably argued, conſtrued the will as if the word *poor* was not in it." The ſtatute therefore, was the rule and guide.

(*i*) See Green *v.* Howard, *ſuprà*. (*k*) Iſaac *v.* Defriez, Ambl. 595. (*l*) Widmore *v.* Woodroffe, Ambl. 636.

It has been determined, that relations *by marriage*, will not be included in a bequeſt to "relations" generally, or to the teſtator's "next of kin"—Thus—

(*m*) *A.* having made an abſolute bequeſt to his wife of a watch and other things given her by any of her relations, and the uſe of the family pictures for life, gave the reſidue of his perſonal eſtate to truſtees, to place it at intereſt, and permit his wife to receive the intereſt to her uſe during her life, and after her deceaſe, then he gave the capital and all ſecurities thereof, "to ſuch of his relations as would be entitled thereto by the laws in force of diſtribution, to be divided as the ſaid laws direct." By another clauſe the teſtator directed, that whoever commenced a ſuit againſt the wife or truſtees during her life, ſhould have no part of his real or perſonal eſtate, but that his or their part ſhould go among "ſuch other of his relations, as the ſtatute of diſtributions ſhould appoint to be equally divided ſhare and ſhare alike." The general queſtion was, whether the widow was intitled not only to the whole ſurplus of the perſonal eſtate for life, but alſo to a moiety thereof abſolutely? And by the Lord *Chancellor*, "The queſtion depends on the clauſe of the bequeſt of the reſidue, and on the intent of the teſtator from the whole frame of the will: the intent is plain; the only conſideration being, whether the teſtator has uſed proper words to expreſs it. Here is firſt an expreſs eſtate for life, which is not to be enlarged by ſubſequent implication; for that it muſt be very plain, *relation* is a very general word, and takes in any kind of connection; but the moſt common uſe of it is to expreſs ſome ſort of kindred either by blood or affinity, though properly by blood. The teſtator certainly does not uſe it in the general ſenſe, nor in the vulgar ſenſe; becauſe he refers it to the ſtatute of diſtribution which has nothing to do with affinity, but blood only. Then does it take in the wife? It cannot be ſaid there is no relation between huſband and wife, but the queſtion is, whether it be ſuch relation as is here meant? He mentioned the ſtatute of diſtribution; it certainly means relations included in the ſtatute by *next of kin*, which words are in both the clauſes thereof, uſed in oppoſition to a wife (*n*), *kindred* meaning of the ſame family and kind with the inteſtate. But this is not deciſive in the preſent caſe, it muſt receive the ſame conſtruction from the other part, where he gives it after the deceaſe of the wife and puts her out of the caſe. It were abſurd to ſuppoſe he meant the wife's executors to take with his relations, but it reſts not here: the whole frame muſt be conſidered, which was to give the wife a preſent maintenance and an uſufructuary intereſt, and

(*m*) Davies *v.* Baily, 1 Veſ. 84. (*n*) See alſo Green *v.* Howard, *ſupra*.

his veſting the whole in truſtees, ſhews he did not intend the abſolute property of the moiety in the wife, the creating the truſt being merely to preſerve the intereſt to thoſe who were to take after her death: otherwiſe he would have given her this moiety abſolutely before the creation of the truſt; and were the other conſtruction to prevail, the family pictures would after her death, be divided among her executors as well as the relations. In the latter clauſe he certainly meant other relations than the wife, otherwiſe according to the ſtatute, the wife ſhould have one moiety, and the reſt be ſhared. The intent therefore was, that the wife ſhould have the whole for life only; the other conſtruction would be ſtrained and contrary thereto." Again—

(*o*) *T. S.* being ſeiſed in fee of lands of 90l. a year, deviſed them to his wife for life, and after her deceaſe to his kinſman *C.* and the heirs of his body, and for want of ſuch iſſue, to be ſold and the money divided among his *relations* according to the ſtatute of diſtribution of inteſtates eſtates where no will is made; and then he gave his houſes in *F.* to his wife in fee ſimple. The queſtion was whether the wife was intitled with the teſtator's next of kin, to a ſhare of the money to be produced from the ſale of his real eſtates? and Lord *Hardwicke*, C. "The bill is brought by the plaintiff as executor of *S. L.* (the wife) againſt the defendants, who are next of kin of *T. S.* (the teſtator) for a ſale of his real eſtate, which he deviſed in the manner already ſtated; and what he now claims is one moiety thereof under the ſtatute of diſtributions, as the repreſentative of Mr. *S.*'s wife. The queſtion depends upon the conſtruction of the will ariſing out of the words and the intention of the teſtator. In the courſe of the cauſe I have changed my opinion, which at firſt leant in favour of the wife. What is the ſenſe to be put upon the word *relation?* In the will it is uſed in an improper manner; it ſignifies in grammar an abſtract quality, any relation that ariſes in ſocial life; but in vulgar acceptation, it is transferred to a perſonal ſenſe, and is ſo uſed in this will, as if he had ſaid *kindred*, which is the word in the ſtatute, and where the will refers to the ſtatute it muſt be taken as the ſtatute takes it (*p*). Strictly, the wife is no relation to the huſband; *relation* in dictionaries means *conſanguinei* and *affinis*, but by the ſtatute, it means *kindred by blood* only. The wife is no relation by blood, or by affinity: See *Calvin's Lexicon*, title *Affinitas*; the wife, ſays he, *non affinis eſt, ſed cauſa affinitatis; affinis ab eodem ſtipite. Skinner*, title *Cognatio, parentela.* If the wife were next of kin, ſhe muſt exclude all the reſt. The ſtatute of

(*o*) Worſeley *v.* Johnſon, 3 Atk. 758. (*p*) Watt *v.* Watt, 3 Veſ. Jun. CC. 244.

21 Hen. 8. c. 5. ſect. 3. intitled, "What fees ought to be taken for probate of teſtaments,' ſays 'in caſe any perſon die inteſtate, the ordinary ſhall grant adminiſtration of the goods of the perſon deceaſed, to the *widow* of the ſame perſon, or to *the next of his kin*,' diſtinguiſhing more clearly between them than the ſtatute of diſtributions. This then is the ſenſe of the word 'Relations,' but if that would not anſwer the apparent intention, it muſt give way to it. I think if the ſtrict ſenſe of the word does not take in the wife, it falls in with the intention, for the teſtator gives his wife the rents of the eſtate for life, and then to his nephew in tail. Nothing can be more improbable than to imagine he had in view his wife's being alive at the determination of the intail, to ſhare in the diſtribution of the money at that time. Should it go at fifty or at one hundred years diſtance, ought it to go to the remoteſt repreſentative of his wife, even in this caſe to the repreſentative of the ſecond huſband of the wife? Suppoſe he had ordered a diviſion *between my own relations* as the ſtatute directs, this plainly would have included relations by blood only, and can never in common parlance mean his wife, and the words *my relations* mean the ſame as *my own*. The caſe of *Davis* v. *Baily* (*q*), is in point, and I can find no difference, for there the deviſe was 'to ſuch of *my relations* as would have been intitled by the ſtatute of diſtributions.'" His Lordſhip therefore diſmiſſed the bill. And in another caſe—

(*r*) *C.* by his will, after giving a number of legacies, moſt of them to relations, viz. to a brother, ſiſters, nephews, nieces, and their children, and 500l. to his brother in law; by a codicil made the following diſpoſition, "My will and intention is, that whatever money over and above what I have already bequeathed, I may be poſſeſſed of at my death, may be divided among my ſaid *relations* by my executors, in the proportion I have bequeathed the other part of my fortune." One of the queſtions was, whether the teſtator's brother in law was intitled to a ſhare of the reſidue, as one of his relations? And the Lord *Chancellor* decided againſt his claim, and ſaid "I take it, that where a perſon gives among his relations, thoſe by affinity are not included."

Although the Court of Chancery has adopted the ſtatute of diſtributions as a guide to the conſtruction of the general word "Relations," yet it appears from Lord *Hardwicke*'s opinion in *Worſeley* v. *Johnſon* (*s*), and from the caſe next ſtated, that if the teſtator's intention can be aſcertained to compriſe relations in a degree more remote than thoſe who would be in-

(*q*) *Suprà*. (*r*) Maitland *v.* Adair, 3 Veſ. Jun. CC. 231.
(*s*) *Suprà*.

titled under the ſtatute, ſuch intention will prevail, becauſe the ſtatute is ſubſtituted only when the intention cannot be made out. The intention, however, muſt be collected from the will, for parol evidence to prove that particular relations were meant cannot be admitted (*t*).

(*u*) *A.* bequeathed the reſidue of her eſtate to be divided between her relations (i. e.) the *B.*'s, the *C.*'s, and the *D.*'s. The *C.*'s, though not within the degree of relationſhip required by the ſtatute, were permitted to take jointly with the *B.*'s and *D.*'s.

A bequeſt to "repreſentatives" or "legal repreſentatives" is generally underſtood to apply to thoſe perſons who are technically termed ſuch, viz. *executors* or *adminiſtrators*. Thus—

In the caſe of *Evans* v. *Charles* (*x*), *Eyre*, Ch. B. delivered the opinion of the court as follows: "This caſe ariſes upon the following circumſtances. *John Heath*, by his will in 1748, after giving ſome pecuniary legacies, to be paid out of the money due to him from *Charles Floyer*, left the reſidue of his fortune to his ſiſter *Alice Heath*, and appointed her his executrix. The debt from *Charles Floyer* was 668l. ſecured by bond. He becoming inſolvent, came to a compoſition with his creditors ſoon after *John Heath*'s death, by which *Alice Heath* and moſt of the other creditors agreed to accept ten ſhillings in the pound in ſatisfaction of their demands. Before receiving this compoſition, *Alice Heath* died in 1751, and by her will, after ſome legacies, bequeathed the reſidue of her property among ſome of her relations, whoſe repreſentatives are parties in the cauſe: ſhe appointed *William Charles* and *William Watkins* her executors. *William Watkins* having ſurvived his co-executor *William Charles*, died, leaving the plaintiff, *Elizabeth Evans*, his daughter, who obtained adminiſtration of his effects, and has likewiſe been appointed adminiſtratrix *de bonis non* of *John Heath* and *Alice Heath*. Afterwards in 1786, *Blanch Floyer*, the widow of *Charles Floyer*, died, having made her will, by which after reciting the inſolvency of her late huſband and her intent to charge her eſtates with the payment of the remaining ten ſhillings in the pound to the creditors, who accepted the compoſition, ſhe deviſed certain eſtates to truſtees in truſt, to raiſe a ſum of money equal to the ten ſhillings in the pound given up by them, and to pay the ſame unto ſuch of the creditors as accepted the compoſition, "*or their perſonal repreſentatives*,"

(*t*) Edge *v.* Saliſbury, *ſuprà*. (*u*) Greenwood *v.* Greenwood, in a note to Green *v.* Howard, 1 Bro. CC. 32. (*x*) Anſtr. Rep. in the Exchcq. 128.

rateably and in proportion to their reſpective debts. Of the ſhare of this bequeſt, coming to the repreſentatives of *Alice Heath*, four ſets of claimants have appeared: firſt, the plaintiff *Elizabeth Evans*, as adminiſtratrix of *Alice Heath*, the compounding creditor: ſecondly, the reſiduary legatees under the will of *Alice Heath*, who claim this as part of her eſtate: thirdly, the next of kin of *Alice Heath*, at the time of her death, or their repreſentatives, who inſiſt upon this ſum as a part of her property undiſpoſed of by her will: fourthly, the next of kin of *Alice Heath*, at the time of the death of *Blanch Floyer*, on the ground of this ſum not having veſted as part of her eſtate till that time. Between theſe claims we have found ourſelves very much puzzled to form any determination; and we now decide it rather becauſe it is neceſſary to award the property to ſome one, than that we ſee clearly a ſuperior right in any. The only queſtion is, who are entitled to take under the deſcription of the *perſonal repreſentatives* of the creditor. The adminiſtratrix contends that that is a mere *deſcriptio perſonæ* under which ſhe is entitled; that the teſtatrix *Blanch Floyer* meant to reſtore what the compoſition had taken away; that ſhe is to be conſidered as throwing this into the maſs of the eſtate, to veſt in the legal repreſentative of the creditor with her other property, without any ulterior view as to the diſtribution of it. Certainly, whoever is entitled to this fund muſt claim through her, as having the legal right, and the difficulty is to raiſe any truſt by which ſhe can be bound to pay it over to any other perſon. If we revert to the will of *Alice Heath*, there is this abſurdity, that we are applying her directions in her will to a fund which did not then belong to her, and which cannot by any poſſibility be conſidered as part of her eſtate at the time of her death. If ſhe had expreſsly deviſed this ſum, it would have been void for want of intereſt in her; then no implication can raiſe a truſt in favour of the reſiduary legatees, where an expreſs deviſe to them would have been bad; and if they cannot claim under the will, certainly they have no title. The next point is, whether either ſet of next of kin can claim under the ſtatute of diſtributions, or by any equity analogous to that ſtatute. The perſonal repreſentative is in general conſidered as truſtee of the property deviſed from the teſtator, undiſpoſed of, *as belonging to him.* But of property which never did belong to him, I cannot ſee that any ſuch truſt can be raiſed, or that the next of kin have any claim. Their right muſt veſt in intereſt at the death of the inteſtate if at all; the next of kin therefore at the death of *Alice Heath*, would be the perſons to claim, if any could; but at that time this had not veſted, nor could ever veſt as part of her eſtate. Then it ſeems to follow as a neceſſary concluſion,

that the legal repreſentative of *Alice Heath*, muſt take this ſum for her own benefit, whether that might have been within the intention of the teſtatrix or not, if there is no other perſon intitled as *ceſtui que truſt* of the money, the plaintiff muſt have it for herſelf, becauſe no one can take it from her. It is not neceſſary that an intention in her favour ſhould be expreſsly ſhewn by the teſtatrix. Probably ſhe had no remote intent to define the objects of her bounty, which was meant generally as an act of juſtice to the eſtate of the creditor. Has ſhe demonſtrated any intent in favour of either of the other claimants? If not, the rule of law muſt prevail. The plaintiff is deviſee; no implied truſt can be ſhewn in favour of any other perſon, ſhe muſt hold for her own benefit. The caſe of *Bridge* v. *Abbott* (*y*) at firſt raiſed a doubt in the minds of the court; there the *Maſter of the Rolls* conſtrued the words '*legal repreſentatives*' as a deſignation of the next of kin, from the appointment of the teſtator in their favour, and the excluſion of any other poſſible intention. If we could ſay in the preſent caſe, that any perſon was particularly deſigned under the words of the bequeſt, we ſhould find no difficulty in the caſe; but here there ſeems to be no poſſible ground to imply the reſiduary legatee, or either ſet of next of kin, as particularly meant to be benefited. We do not, therefore, mean to diſpute the authority of that caſe, it will ſtand upon its own grounds. The *Maſter of the Rolls* reſted on the deſignation of perſonal repreſentative, in the ſtatute of diſtributions, as a ground to conſtrue it in favour of the next of kin in that caſe. He there obſerves, that it is confined in the ſtatute to the immediate repreſentatives, as the ſon repreſenting his father, and does not extend to more remote kindred: here the next of kin are collateral. We find, therefore, inſuperable difficulty to take this fund from the perſon who anſwers the deſignation in the bequeſt as perſonal repreſentative of *Alice Heath*; and decree that *Eliz. Evans* is intitled under the will of *Blanch Floyer*."

The words "repreſentatives" or "legal repreſentatives" though when abſtractedly conſidered are to be underſtood as deſignating thoſe perſons whom the law has deſcribed as ſuch, yet they may be conſtrued and explained according to the intention of teſtators as collected from their wills; if therefore, an inference can be drawn from the will that a teſtator intended any particular relations anſwering the deſcription of 'repreſentatives' in preference to thoſe whom the law ſo conſiders, they will be intitled. Thus—

(*z*) *A.* bequeathed the reſidue of her eſtate to ſeveral perſons equally, but in caſe any of them died before her, ſhe directed

(*y*) *Infrà.* (*z*) Bridge *v.* Abbott, 3 Bro. CC. 224.

that the ſhare or ſhares of him, her, or them ſo dying, ſhould go to, be had, and received by his or her "*legal repreſentatives*" and appointed *B.* and *C.* executors. One of the queſtions was, who were intitled to the ſhare of *J. Webb*, one of the reſiduary legatees, that died before the teſtatrix, the claimants being, the executors, reſiduary legatees, and next of kin of *J. Webb*? And the *Maſter of the Rolls* delivered his opinion to the following effect. "There is nothing more clear than that a teſtator may if he think fit, prevent a legacy from lapſing. It is neceſſary according to *Sibley* v. *Cook* (3 Atk. 572) not only that he ſhould declare that the legacy ſhould not lapſe, but likewiſe who ſhould take in the ſtead of the reſiduary legatee. I cannot ſuppoſe that the teſtatrix meant, by the ſubſtitution, that any perſon who claimed under the will of the reſiduary legatee ſhould take, nor could ſhe intend, that any perſons who ſhould caſually repreſent *J. Webb* as executors, who might be different perſons, one repreſenting him here, another abroad, one in the Province of *Canterbury*, another in the Province of *York*, ſhould take, ſhe could not mean, that the perſon who might be intitled to the probate of the will, ſhould take this beneficially. The executors being out of the caſe, the next thing is, whether ſhe could intend that it ſhould be given in ſuch a manner that *J. Webb* ſhould diſpoſe of it. She might have done this by giving it to ſuch perſon as *J. Webb* ſhould appoint. If ſhe had given it thus, all the perſons who had claims under his will, and their repreſentatives, if they died before *A.* the teſtatrix muſt take, the ſuppoſition of which is abſurd. I am of opinion that the true conſtruction is, that by 'legal repreſentatives' ſhe meant ſuch perſons as could claim *J. Webb*'s property in their own right, which would be his next of kin. What does *J. Webb* diſpoſe of by his will? his own eſtate; he does not affect to diſpoſe of what might come from the will of a living perſon. It ſo happens that there may be a ſpecial reſidue as there was in the *Attorney General* v. *Johnſon*, Ambl. 577. where the queſtion was, whether by *reſidue* was meant all that ſhould lapſe, and it was held that he did not intend the lapſed legacy to paſs. The caſe of *Davers* v. *Dewes*, 3 P. Will. 40. was there referred to. It is abſurd to ſuppoſe that he meant every thing to paſs which might ariſe by freſh acquiſition. Is it poſſible he could intend to paſs what might come under this will? Although it is argued that perſons by theſe reſiduary deviſes often convey eſtates of which they were not connuſant; yet ſuppoſe he had children, and after giving ſomething to each, had given the reſidue to one, *non conſtat*, he meant the ſame in caſe of a great acquiſition. Then it is not probable he meant theſe perſons to take by the deſcription of *legal repreſentatives*. It is true, that by *legal repreſentatives*, in the court of chancery, we generally mean the perſons in whom the eſtate legally veſts.

But theſe may be ſeveral perſons according to the ſituation of the property, one perſon in the Province of *York*, another in the Province of *Canterbury*. There is another ſenſe in which the words *legal repreſentatives* may be underſtood, viz. the perſons intitled beneficially to the property. It is true, in the ſtatute of diſtributions, the word *legal repreſentatives* are not uſed for next of kin, nor for executors or adminiſtrators, but for the inteſtate's children, or their children only, or the deſcendants of the next of kin: the ſtatute means perſons ſubſtituted in the place of others deceaſed. I think that I impute a more probable ſenſe to the words than either the executor or reſiduary legatee of *J. Webb*. Then another queſtion may be made, whether they are to be the repreſentatives at the death of *J. Webb*, or of *A.* (the teſtatrix) and if they be different perſons, an enquiry muſt be directed as to that. I think they cannot be the legal repreſentatives at his death, for then the ſhares would be lapſed before they veſted; but his legal repreſentatives at the death of *A.* for ſhe meant it to go to perſons alive at her deceaſe. She meant ſuch perſons as at the time of her death would be intitled to *J. Webb*'s property, if he had ſurvived her, or died inteſtate. This ſeems to be the moſt rational conſtruction, and liable to the feweſt abſurdities, for the ſhare of the reſidue was not intended to be aſſets of *J. Webb*. The caſe of *Sibley* v. *Cook*, will, I think, hardly prove much; it was given to executors. I think if that had been the word uſed in this caſe, there might have been conſiderable doubt. The perſon taking could not claim under *J. Webb*, his executor might have been an executor in truſt, I think, therefore, ſhe meant his next of kin at her death. It might have been, that ſome of them had died between his death and her's: as none died there will need no enquiry. I muſt, then, declare the perſons intitled as legal repreſentatives, to be the perſons who would have been intitled as next of kin to *J. Webb*, at the death of *A.*" Again—

(*a*) Upon the marriage of *A.* and *B.* 1000l. was ſettled in truſt, to inveſt in government or on real ſecurities, and pay the dividends or intereſt to the ſeparate uſe of *B.* and after her death, if there ſhould be any iſſue of the marriage living, to divide the principal among the children equally at 21, or marriage. But if *A.* ſhould have no iſſue by *B.* or they ſhould all die in her life, then immediately after her death, without iſſue of her body then living, to pay the 1000l. to *C. D.* if he ſhould be then living, but if dead, then to ſuch perſon or perſons as he ſhould by deed or will appoint, and for want of appointment, then to the "legal repreſentatives" of *C. D.* accord-

(*a*) Jennings v. Gallimore, 3 Veſ. Jun. CC. 146.

ing to the courſe of adminiſtration. *C. D.* by his will, reciting the ſettlement and his power of appointment, proceeded thus, "now I do hereby, in purſuance of ſuch power, direct and appoint the ſaid ſum of 1000l. in caſe my ſaid niece *B.* ſhould happen to die without iſſue, to be paid by the ſaid truſtees, or the ſurvivor, his executors, adminiſtrators, or aſſigns, unto my *legal repreſentatives*, according to the courſe of adminiſtration" and the teſtator gave the reſidue of his real and perſonal eſtate to his nephew *W. G.* and appointed him and *J. H.* executors. *B.* having died without iſſue, the queſtion was, whether the aſſignees of the nephew *W. G.* a bankrupt, or the other next of kin of the teſtator were intitled to the legacy of 1000l.? And it was contended for the aſſignees that the expreſſion "*legal repreſentatives*" muſt mean ſuch perſons as by law are ſo conſidered, viz. the teſtator's executors; but by the *Maſter of the Rolls* "if it had reſted upon the ſettlement itſelf, I ſhould have had great doubt of being able to get over the words 'legal repreſentatives,' and if he had died inteſtate without executing the power, I ſhould have paused long before I could have given any other interpretation than that contended for by the aſſignees: but I cannot read this will without implying an intention to conſider it otherwiſe. He would never have made ſuch a will if he had thought all the words he had uſed came to nothing more than executing the power, by giving the fund to *W. G.* which power he anxiouſly takes the trouble to execute, and expreſsly recites, that it enables him to give it to any perſon he thinks fit. If he meant to give it to him to whom he has given all the reſt, why did he not ſay ſo? I am now told, that this recital and anxious execution of the power and diſtinction of this fund from the reſt, mean only to give it to him, to whom he might if he thought fit have given it expreſsly; I cannot think he ſo intended it. As a lawyer I muſt have underſtood the words as the aſſignees do; if it were upon the deed alone, and he had died inteſtate, I muſt have conſidered that it was a deed, and though I could not know what the party meant, I muſt have given the words their legal ſenſe: but it is almoſt impoſſible to ſuppoſe, that any man, uſing theſe words, could have meant the conſtruction contended for by the aſſignees; and which, perhaps, might without the will, have been the true conſtruction; but I deſire not to be underſtood to decide that. But upon the will, I am of opinion, that he did not intend *W. G.* to have this fund, and then the only perſons who can take it, muſt be thoſe intitled to his perſonal eſtate. Declare, therefore, that it belongs to the next of kin; and I deſire it may be underſtood, that I am not by this decree putting any conſtruction upon the deed itſelf, it is entirely upon the will and the execution of the power thereby." And in another caſe—

(*b*) *A.* bequeathed certain leasehold premises, after the second marriage or death of his wife, or from the time of one of his sons attaining 21, in trust for his son *Thomas* for life, with remainder in trust for such issue-male, or descendants of such issue-male of *Thomas* as at the time of his death should be his heir at law; but if there should be no issue-male nor descendants of issue-male of *Thomas* living at his decease; then in trust for the testator's son *George* for life, with the like limitations in favour of his issue-male, as were made to the issue-male of *Thomas*: and in the event of *George* dying without leaving issue-male, or any descendants from them, in trust for the child with which his wife was then *enfient*, for life if a son, with similar limitations to his issue-male, as declared in favour of the issue-male of *Thomas* and *George*, with the ultimate limitation (in case such child should not be a son, or being so, if he should die without leaving issue-male or descendants from him or them) to such persons as should 'then be the legal representatives' of the testator; and he appointed his wife sole executrix. The will, as originally prepared, gave the property to the child, of which the wife should be *enfient*, and his issue generally, after the decease of the testator's other two children, and failure of their issue. It appeared to have been altered afterwards, by interlining the word 'male' wherever 'issue' occurred, and the ultimate limitation originally was, that in default of issue of the unborn son, the trustees should be possessed of the premises, in trust for 'the executors and administrators of my son Thomas:' those words were struck through with a pen, and the following words were interlined 'such persons as shall then be my legal representatives.' The child with which the testator's wife was *enfient* at his death, was a son named *John*; but *Thomas* having survived him and *George*, both of whom died without issue, and also his mother who by her will appointed him executor, died without issue, having first made a will and nominated executors. One of the questions which arose was, whether the testator *A.* by the words 'legal representatives' intended those according to the statute of distributions, or those under the authority of the ecclesiastical court. The contest being between the next of kin of *A.* living at Thomas's death, and the executors of *Thomas*; *Thomas* being the executor of the widow and executrix of *A.* and also the executor of *John*. The cases of *Bridge* v. *Abbott*, and *Evans* v. *Charles* (*c*) were cited, and the Lord *Chancellor* gave judgment as follows,—"I think both the determinations which have been cited, perfectly right. They shew that the words are to be explained according to the subject-matter. Have they any

(*b*) Long *v.* Blackall, 3 Ves. Jun. CC. 486. (*c*) *Supra*.

meaning if I take them in their legal ſenſe? I can better tell what was not, than what was his meaning. It is perfectly clear, referring to a future time, he could not mean his *legal* repreſentatives. He altered a very ſenſible part of his will, which is vaſtly ſtrong, for it proves he thought upon it, and had ſome decided meaning. His firſt thoughts were very ſenſible, to give the abſolute intereſt to his ſon in caſe the intail could not take effect; that would have been the wiſeſt thing he could have done in making that alteration, which he did with deliberation; not ſuffering his ſon to take this remainder after all the particular purpoſes were exhauſted, it is quite impoſſible he could mean it to veſt in his wife, tranſmiſſible to thoſe who ſhould become her legal repreſentatives; it would be too much conjecture to apply the words to an heir at law, particularly upon leaſehold property; there is nobody I think who can take it but the *next of kin* at the time of diſtribution. He certainly meant to keep it in his blood, he could not mean that it ſhould be as if he had not diſpoſed of it."

In general when legacies are given after the death of legatees, to "the relations," "the repreſentatives," or, "the next of kin," of teſtators, thoſe perſons only, who anſwer the deſcription at the death of the teſtators, will be intitled,—

(*d*) *A.* bequeathed 5000l. in truſt for his daughter *B.* for life, and then proceeded thus, "After the death of my daughter, *B.* upon truſt, that my ſaid truſtees, their executors, or adminiſtrators, do pay the 5000l. unto ſuch child, or children, of my daughter *B.* as ſhe ſhall leave at her death, in ſuch ſhares and proportions as ſhe ſhall think fit; but if ſhe die without leaving a child, then as to 1000l. part of the 5000l. in truſt for the executors, adminiſtrators, or aſſigns, of my ſaid daughter, and as to 4000l. remainder of the 5000l. in truſt for ſuch perſon or perſons, as ſhall be my heir or heirs at law." A queſtion aroſe, whether the heirs, anſwering that deſcription at the teſtator's death, who alſo happened to be his only then next of kin, were intitled to the 4000l. as *B.* died without leaving a child? or whether the perſons, anſwering the deſcription of heirs at law, at the death of *B.* had the preference, and the *Maſter of the Rolls* determined in favour of the perſons who anſwered the deſcription of heirs at law, and next of kin, at the teſtator's death, (one of whom was *B.*) there being no expreſſions in the will deferring the period of veſting to the death of *B.*

If however it appears from the context of the will, that the teſtator intended thoſe perſons only who ſhould be his relations, or next of kin, at a particular period, ſhould take; the intereſt will not veſt prior to the arrival of the time preſcribed.

(*d*) Holloway *v.* Holloway, 5 Veſ. Jun. CC. 399.

(*e*) *A.* bequeathed his reſiduary eſtate to truſtees to place out at intereſt, and pay thereout to his brother *W. Dawſon*, the yearly ſum of 20l. for life, and to pay the ſurplus intereſt towards the maintenance and education of the children of the teſtator's daughter, *Mary Overton*, during the life of *W. Dawſon*, and after his death to pay the whole intereſt in the maintenance, &c. of *Mary Overton's* children, until they attained 21, and then to ſell the ſecurities and pay the whole perſonal eſtate among ſuch children equally at their reſpective ages of 21, with the benefit of ſurvivorſhip among them, if any died before the times of payment; and he declared that until his daughter ſhould have ſuch child or children, or in default thereof, or if ſhe ſhould ſurvive them, the truſtees ſhould pay the intereſt, after deducting the annuity of 20l. for the ſeparate uſe of *Mary Overton*, for life, and after the death of her and her children, in caſe the latter died under 21, that the *reſiduum* ſhould be diſtributed among his *relations* in a due courſe of adminiſtration. It appeared from the maſter's report, that at the teſtator's death, *Mary Overton* was his only daughter and ſole next of kin, and ſuppoſing her to have been then dead, the teſtator's nephews and nieces, named in the report, were his next of kin and neareſt relations; that all of them died in the life of *Mary Overton*, who died in 1800, a widow without leaving iſſue, and that the great nephews, and great-nieces of the teſtator, alſo named in the report, the children of his nephews and nieces, who ſurvived him, but died in the life of *Mary Overton*, were the only next of kin of the teſtator living at his death, and at the death of *Mary Overton*. Queſtion, whether the reſidue was given to ſuch perſons as were the relations of the teſtator, at his own death, or as would be his relations at his daughter's death? And by the *Maſter of the Rolls*, "In *Holloway* v. *Holloway*, Lord *Alvanley*, was of opinion that the deſcription was to be taken with regard to the time of the teſtator's death, and conſequently that the daughter, who had an intereſt for life in the whole fund, and whoſe executors were to take 1000l. out of it, was intitled to ſhare with his other daughters in the reſidue of that fund, bequeathed in truſt for ſuch perſon or perſons as ſhould be his heir or heirs at law. In this caſe the queſtion is likewiſe, though upon a will ſomewhat differently expreſſed, whether the reſidue is given to ſuch perſons as were the relations of the teſtator at his own death, or, as would be his relations at his daughter's death: the former conſtruction contended for both by the repreſentatives of the daughter, and the repreſentatives of the nephews and nieces of the teſtator, who, if there had been no daughter, would have

(*e*) Jones v. Colbeck, 8 Veſ. Jun. CC. 38.

been his neareſt relations at his death. Certainly it would be difficult, as the word relations has now by conſtruction received the ſame meaning as *next of kin*, to hold that thoſe who do not anſwer the deſcription of next of kin, at either period, the death of the teſtator, or that of his daughter, ſhould take by the deſcription of the relations. The argument however which they uſe is, that the teſtator had already given to his daughter all he intended for her, and could not intend her to take any part of the reſidue, and therefore muſt mean ſuch perſons as would be his relations, if his daughter were excluded. To that it might be anſwered, that he has given the reſidue by a deſcription, that applies to her excluſively, and you are not by inference and argument from the other parts of the will, to controul the effect of a poſitive bequeſt. In *Holloway* v. *Holloway* it was very improbable, that the teſtator intended his daughter *B.* ſhould take any more than what was expreſſly given to her, *viz.* the intereſt of the whole for her life, and the 1000l. given to her executors after her death. But Lord *Alvanley* conceived there could be no other queſtion than as to the period to which the deſcription ſhould refer, for if that was to be the time of the teſtator's death, he thought it a neceſſary conſequence that ſhe ſhould be included, as ſhe was one of the perſons anſwering the deſcription, though there were other perſons equally anſwering it. It is more difficult in this caſe to exclude the only perſon, who correctly anſwers the deſcription, in favour of thoſe, who in ſtrictneſs do not anſwer it at all. If therefore I were bound to hold, that he meant relations at his own death, it would be very difficult upon the caſe of *Holloway* v. *Holloway* to decide againſt the claim of the repreſentatives of the daughter, and to admit that of the nephews and nieces, as anſwering the deſcription of relations at his death, without diſſenting from the conſtruction made in that caſe, upon that particular will. It is enough to ſay, I think in the preſent caſe it is evident that the teſtator intended to ſpeak of relations not at the time of his own death, but at that of his daughter or her iſſue under the age of 21. There are great difficulties in the way of the claim, either of the daughter's repreſentatives, or of the repreſentatives of the nephews and nieces; to none of which is the claim of the great-nephews and great-nieces expoſed. As to the claim of the daughter, it is hardly poſſible the teſtator could mean to deſcribe an only daughter by the terms, "my relations," directing alſo the reſidue to be diſtributed among thoſe relations. Next, it is impoſſible, that he could take this ſtrange circuitous method of giving her the whole reſidue on the event of her dying without children, inſtead of directly ſaying ſo. The relations who were to take, in caſe ſhe ſhould die leaving no iſſue, or none who ſhould attain the

age of 21, could not be herſelf, tranſmitting her right to her repreſentatives. Then upon the claim of the nephews and nieces, the teſtator clearly ſuppoſed his daughter was to ſurvive him. Then he knew ſhe was his neareſt relation; at all events one of his relations, taking that word in any ſenſe. If therefore, he intended to give to thoſe, who next to her ſhould be his neareſt relations, he would not have uſed an expreſſion neceſſarily including her, but would have given expreſsly to the nephews and nieces; all of whom are mentioned before as legatees under that deſcription, and it would be extremely difficult, as I have before obſerved, for them to take under the deſcription of "*next of kin*," a deſcription which they do not anſwer. But if he meant relations at the death of his daughter, the expreſſion is very proper. It involves no difficulty: it requires no conſtruction. I am clearly of opinion, he could not mean, either the repreſentatives of his daughter, or thoſe of his nephews and nieces. What other ſenſe then can be put upon it, than that only intention which makes the whole perfectly conſiſtent? Declare that the whole reſidue belongs to the great-nephews and great-nieces of the teſtator."

Attempts have been made to induce the Court of Chancery to put the ſame conſtruction upon the word 'deſcendants,' as 'relations,' but the court has conſtantly refuſed the applications, as the principle which applies to the latter caſe does not apply to the former, for when a bequeſt is made to relations, unleſs the court were guided by the ſtatute of diſtributions in aſcertaining the legatees, the diſpoſition would be void from the uncertainty and generality of the term, but when the word 'deſcendants,' is uſed, there is no neceſſity for reſorting to the ſtatute to fix or limit the objects of the bequeſt, as the natural import of the term is ſufficient to include every individual proceeding from the ſtock or family referred to: accordingly a 'legacy to the deſcendants of *B.*' will embrace all his children, grand-children, &c.

(*f*) *R.* deviſed his eſtate to *C. L.* and *F.* for their lives and the life of the ſurvivor, and after their deaths, he gave it "to the deſcendants of *F. I.* now living in and about *Sevenoaks* in *Kent*," or thereafter living any where elſe, to be ſold, and the money to be divided *equally* amongſt them, and then he gave 4000*l.* to the deſcendants of *F. I.* in the ſame words. Bill by the kindred in the third degree againſt the truſtees, the kindred in the ſecond degree, and one in the fourth degree, which laſt was born after the will was made. And by Sir *Thomas Clarke*, *Maſter of the Rolls*, "A deviſe to deſcendants

(*f*) Crosſly *v.* Clare, Ambl. 397. Alſo Pierſon *v.* Garnet, 2 Bro. CC. 38---230, S. P.

at large had been good. He has added a deſcription of ſuch as he intended ſhould take, which is ſufficiently preciſe and certain. Where the word "relations," is uſed, the court has no other rule to go by but the ſtatute of diſtributions, otherwiſe the deviſe would be void, from the uncertainty and generality of the term. Where the deviſe is to the ſtock, or to the family, the court confines it to the head of the family for the ſame reaſon. *Chapman's* caſe, cited in *Hob.* 33, 2 *Vern.* 381. It would be unjuſt in this caſe to confine it to the heirs at law, becauſe the word *deſcendants*, means all thoſe who proceeded from his body, and therefore both the grandchildren of *F. I.* are intitled both to the real eſtate and the 4000l. but the great-grandchild, being born after the will was made, is excluded by the words "*now living.*" It ſeems alſo that the diſtribution muſt have been *per capita.*

(*g*) *B.* deviſed and bequeathed the reſidue of her real and perſonal eſtate to truſtees in truſt to ſell the real, and the money ariſing therefrom, together with the perſonal eſtate to divide *equally* between the *deſcendants* of *T. F.* deceaſed. At the teſtatrix's death there were living three ſons of *T. F.* and eleven grand-children. For the ſons it was contended that the legacy to the deſcendants of *T. F.* meant thoſe, who at the time of taking, would be intitled by the ſtatute of diſtribution, for the word "*relations,*" had always been ſo conſtrued, though no caſe was to be found as to "deſcendants." But it was argued for the grandchildren that "deſcendants," included perſons more remote than thoſe within the ſtatute, and that there was no deciſion which confined "deſcendants," to the ſame ſenſe as "relations," and it was inſiſted that the diſtribution muſt be *per capita.* And the Lord *Chancellor* determined that all the deſcendants of *T. F* ſhould take as well grandchildren as children, and all *per capita.*

In regard to the diſtribution of the fund per *ſtirpes* or *per capita* among the legatees, it ſeems that the words in the will muſt be the guide; if the bequeſt was to the iſſue of *A.* and *A.* died before the teſtator, leaving children and grandchildren, the diſtribution of the legacy would be among all of them *per capita*, and the like conſtruction would be made in inſtances where the fund is given to perſons in exiſtence, and the children of others who are dead to be equally divided among them. Thus in *Butler* v. *Stratton*, the caſe laſt in part ſtated, (*h*) *A.* deviſed his freehold houſes to truſtees in truſt to ſell and divide the money *equally* between *R. S. J. S.* and the children of *M. P.*

(*g*) Butler *v.* Stratton, 3 Bro. CC. 367. (*h*) *Suprà.* See alſo Thomas *v.* Hole, Croſley *v.* Clare, Davenport *v.* Hanbury. *Suprà*, and Royle *v.* Hamilton, 4 Veſ. Jun. CC. 437.

M. P. had three children living at *A.*'s death, and the queſtion was, whether the children ſhould take *per ſtirpes*, in which caſe the money would be deviſible into three parts, to one of which only, the children would be intitled, or whether they ſhould take *per capita*, in which event the fund would be divided into five parts, and each of the children intitled to a ſhare in its own right? And the Lord *Chancellor* decreed that the diſtribution was to be made *per capita*. But if there be any expreſſions in the will from which an inference can be collected, that the legatees were not intended to take in their own right, but by repreſentation, they will be decreed to take *per ſtirpes*, or *per ſtirpes* and *per capita* at the ſame time, as in the authorities referred to and before ſtated. (*i*)

If a legacy were given to or for the benefit of *A* and "family," the word 'family,' would be conſidered as applicable to *A.*'s children only, though the conſtruction may be repelled by a different intention collected from the whole of the will.

(*j*) *T. Lloyd*, by his will, dated the 21ſt of *July*, 1794, gave to *Martha*, the youngeſt daughter of *W. Rolfe*, and the wife of *H. Mac' Leroth*, 1000l. which he directed ſhould be paid, by his executors and truſtees to *W. Rolfe*, if living, for the uſe and benefit of *Martha Mac' Leroth*, to be by him either ſettled or limited for her ſeparate uſe independent of her huſband, and as a proviſion for her and for the benefit of her children, if *W. Rolfe* ſhould ſo think fit and direct, or elſe the whole or any part of it to be paid and applied for the benefit of his "ſaid daughter and her family," either immediately or at any future period, as *W. Rolfe* ſhould think moſt uſeful and beneficial to her and her family, and as he ſhould direct and appoint, and he accordingly willed that *W. Rolfe* ſhould be at full liberty to direct the manner in which the 1000l. ſhould be applied for the benefit of his daughter and "her family," and that the ſame ſhould be paid and applied accordingly, but if *W. Rolfe* died without making ſuch direction, then the teſtator willed that the 1000l. ſhould be paid and applied in ſuch manner, as *Martha Mac' Leroth*, notwithſtanding her coverture and without her huſband's joining, ſhould direct or appoint to be applied for the benefit "of her and her family." The will then proceeded thus, 'In order that *W. Rolfe*, who beſt knows what will be moſt beneficial for his daughter's intereſt, may give directions to whom he wiſhes the 1000l. to be paid for her benefit, and in the manner in which he wiſhes the ſame to be applied, I have wrote to him acquainting him of this, my intended legacy, and have requeſted him to leave directions in writing to whom he wiſhes the ſame to be paid,

(*i*) Wythe *v.* Blackman, and Gale *v.* Bennet. *Supra.* (*j*) Mac Leroth *v.* Bacon, 5 Veſ. Jun. CC. 159.

and how he wishes the same to be applied, so that my trustees and executors may at every event pay and be discharged of the legacy, and may on no account be involved in the trusts thereof, or be any ways answerable for the application, misapplication, or non-application of the same. *Rolfe* died upon the 17th of June, 1798, without having executed an effectual appointment of the 1000l. The 1000l. was paid to *Rolfe* before 1797, and was by him laid out in stock, which stood in his name at his death. *M. Mac' Leroth*, by deed poll, dated the 15th of December, 1798, and properly attested, reciting the will of *Lloyd*, and her power under it, appointed 1000l. and all interest and dividends thereof, in manner following, *viz.* the sum of 800l. to be paid to *Hugh Mac' Leroth*, or to such person or persons, and in such manner and for such purposes as he should think fit or direct, and the sum of 200l. to be laid out in government securities, in the names of the trustees of *W. Rolfe*, in trust to pay the interest and dividends to her for life, and after her death to permit *Hugh Mac' Leroth* to receive the same, if he should survive her, for life, and after the death of the survivor, to divide the capital among all and every their child and children in such manner as they or the survivor should in manner therein mentioned, appoint, and in default of appointment, equally, but if one, to that one, and in case *Hugh Mac' Leroth*, should not accept, or should not dispose of, or apply the sum of 800l. thereby given him, or should be adjudged incapable of taking the same, then she appointed the 800l. or so much thereof as *Hugh Mac' Leroth* should not receive, or apply, to be laid out in the public funds, upon the trusts declared concerning the 200l. The bill was filed by *Mac' Leroth*, and wife, against *E. L. Rolfe*, the executors and trustees of *W. Rolfe*, and the three infant children of the Plaintiffs, praying that *M. Mac' Leroth* might be decreed intitled to appoint the 1000l. for the benefit of herself and family, that the deed and appointment executed by her, might be declared valid and carryed into effect, that the sum of 1000l. might be raised and paid by the executors of *W. Rolfe*, and applied according to the appointment or otherwise for the benefit of *M. Mac' Leroth*, and her family, pursuant to the will of *Lloyd*; and that the will of *Lloyd* might be established, &c. The *Master of the Rolls*, in decreeing according to the prayer of the bill, expressed himself to the following effect;—"I have had some doubt upon this point, and I am only anxious that the decree shall not be supposed to be a determination, that wherever a legacy is given to trustees, in trust, for instance, for a *feme couvert* and her family, it is to be understood that the trustees would be authorised to advance to the husband any gross part of that capital, for the construction of such a legacy, unaccompanied by any other circumstances, would be

that it ſhould be applied for her and her children, and I deſire to have it underſtood, that I by no means give it as my opinion, that the application of that money for the uſe of the huſband would be within the truſt. But the queſtion in this cauſe depends entirely upon the meaning of the whole will, as to the word 'family,' as there uſed, and upon the whole will I am ſatisfied, I am fulfilling the intention of the teſtator by the declaration I ſhall make. There is a clear intention, either that this legacy ſhall be ſettled upon her and her children, to be limited to her ſeparate uſe, and as a proviſion for her and her children, and if that part of the will had taken place, no doubt the huſband could have taken no ſhare, or in the alternative; for if that proviſion does not pleaſe *Rolfe*, the teſtator gives him leave to ſubſtitute another, 'The whole or any part of it to be paid and applied for the benefit of his ſaid daughter and her family,' even there it might be ſaid to mean the ſame as '*children*' before meant: but he adds, 'either immediately or at any future period or periods of time, as the ſaid *Rolfe* ſhall think will, all circumſtances conſidered, be moſt uſeful and beneficial to her and her family,' &c.

Upon this it is clear, he meant, either that *Rolfe* might ſettle it upon her and her children after her, and if ſhe had any then, they were very young, ſo that nothing could be then applied for their benefit, or that he was to have the power to advance any part or the whole either immediately, or in any way he ſhould think, under all the circumſtances, moſt beneficial for her and her family. He might, I think, have advanced part to ſet up the huſband in trade. The teſtator I think meant, that he ſhould have that power, and the word 'family' as here uſed, was meant in a more extenſive ſenſe than children, for he had firſt provided for giving it to her and her children, and then the ſubſequent direction is, to apply it not for her and her children, but for her and her family, and then, if he does not think fit to make ſuch direction, it is to be applied in ſuch manner as Mrs. *Mac'Leroth*, ſhall by any writing, &c. appoint, for the benefit of her and her family. Though an appointment was intended, none was regularly made. Then it was for her to direct any part to be applied as ſhe thought fit, not for the benefit of herſelf and children, but herſelf and her family. The conſtruction her father put upon it, is the true conſtruction, as the teſtator muſt have intended. Therefore deſiring to be underſtood that the word '*family*' would not include the huſband, except from the context, it muſt do ſo, I think, under theſe words; it does include any means the father ſhould think fit to advance the huſband in the world, and if he did not, it gave her power to apply it for any part of her family. The letter from the teſtator to *Rolfe* telling what he intended

to do, and desiring him to leave directions how he wished the legacy to be applied, shews the power is very large. *Rolfe* died intestate as to this 1000l. with that fund in his hands, and not having made any due application of it, I am of opinion, he had at his death that sum in his hands subject to the trust, and his executors are bound to apply it according to the trusts of *Lloyd's* will, and as if *Rolfe* had never acted under it. In that event, being clearly of opinion *Rolfe* had it in his power to buy a commission for the husband, to set him up in trade, or to do any act for the benefit of him and her and their children, and not having done so, the question is, what was her power? The will in creating her power, does not go back to direct, an application to her separate use, and for the benefit of her and her children: but it is to be, for the benefit of her and *her family*. Either then or at any future period she might have bought a house to set her husband up in trade, or have applied it in any way to conduce to the benefit not only of herself and her children, but, as *Rolfe* might have done, for any part of her family. She has appointed 800l. for the benefit of her husband. If she might set him up in trade, she might give it him to apply it.

Therefore not without some doubt, but I think, upon the true construction of this will, not wishing to have it understood, that in any other case differently circumstanced, the word 'family' shall be held to mean the husband. I am of opinion that *M. Mac Leroth* had full power to appoint this fund for the benefit of her husband, and the appointment she has executed must be declared valid."

The admission of parol evidence, to explain doubts or difficulties arising upon instruments, has been for a long time watched over by courts of justice with a jealous eye; it is considered as an unsound mode of interpretation, and some of the modern judges have expressed themselves of opinion, that justice would have been better, and more fairly administered, if parol evidence had never been admitted. But as the province of judges, is merely to dispense the law as they find it settled, they have considered themselves bound to admit this kind of evidence in certain cases in which it has been allowed and established by prior adjudications. Two of the instances in which such evidence has been admitted, are in cases of *wrong* or *imperfect* descriptions of legatees, and to ascertain legatees, when their names have been misspelled or mistaken.

(*k*) *A.* among other legacies, bequeathed to "Mrs. *Sawyer*," 800l. There was no such person ever known to the testatrix, but it was alledged that she meant a "Mrs *Swopper*." And the

(*k*) Masters *v.* Masters. 1 P. Will. 421—425.

court directed the master to inquire whom the testatrix meant by "Mrs. *Sawyer*," and whether Mrs. *Swopper* was not intended, and if he found that she was the person meant, then she was to receive her legacy in proportion with the other legatees.

(*l*) *B.* bequeathed in this manner, "to Mr. *James Maffie* of, &c. and *W. G.* 50l. as executors: pint silver mug, and all my china to Mrs. *G.* and 10l. for mourning." Mr. and Mrs. *Gregg*, claimed under the description of *W. G.* and Mrs. *G.* but the first refused to act as executor. The Master having refused evidence, that they were the persons intended, they excepted to the report. And by the Lord *Chancellor*. "The Master should receive evidence, but legal evidence, to prove who Mrs. *G.* was, but as to the 50l. it is impossible that can be allowed, because it is given to *W. G.* as executor, and he did not prove the will."

(*m*) *C.* bequeathed thus, "I give to the rev. *Charles Smith* of *Stapleford-Tawney*, in the County of *Essex*, clerk, the sum of 500l." The bill was filed by rev. *Richard Smith* claiming the legacy, upon evidence that there was no person answering the description of the legatee, according to the will, and that the plaintiff was at the date of the will incumbent of *Stapleford-Tawney*, and well known to the testatrix, who had a great regard for him. The defendant the executor endeavoured ineffectually to dispute the plaintiff's claim, by setting up another person as the intended legatee who died before the testatrix. The suit was not instituted until many years after the death of the testatrix, and six years after the death of a Lady who lived with her in great intimacy, and who, it was suggested, knew her intentions. The *Master of the Rolls*. "There must be some farther inquiry. But it will be very difficult to oppose this, and to suppose the testatrix made such a mistake, with so particular description and such evidence. This sort of question is now settled. There are many instances of children going by wrong names. My only difficulty is, that the legacy was not called for during so long a time." The defendant then gave up the point, and consented that the plaintiff should have a decree for the legacy with interest, and without costs.

(*n*) *D.* by his will gave 500l. to *Catherine Earnley*; the person's name who claimed the legacy was *Gertrude Yardley*, and it was admitted that no person named *Catherine Earnley* set up any right to this bequest; but it appeared in evidence that the testator's voice, when he made his will, was very low and hardly intelligible; that he usually called the presumed legatee, *Gatty*, which the scrivener, who took instructions for

(*l*) Abbott *v.* Maffie, 3 Ves. Jun. 148. (*m*) Smith *v.* Coney, 6 Ves. Jun. CC. 42. (*n*) Beaumont *v.* Fell, 2 P. Will. 140.

drawing the will, might eaſily miſtake for *Katy*, and that the ſcrivener, not clearly underſtanding who the legatee of 500l. was, or what was her name, the teſtator directed him to *J. S.* and his wife to inform him further on the ſubject, who afterwards declared that *Gertrude Yardley* was the perſon intended. It was alſo in proof, that the teſtator had declared in his lifetime that he would do well for *Gertrude* by his will. And the *Maſter of the Rolls* decreed that the legacy to *Gertrude Yardley*, though by the deſcription of *Catherine Earnley*, was valid, obſerving, that "the name, and not the perſon was miſtaken, and that it was very material that there was no ſuch perſon as *Catherine Earnley* who claimed the legacy, which with the proofs of the teſtator's having a very low voice, when he made his will, and of his having uſually called the plaintiff *Gatty*, inſtead of *Gertrude*, and often declared he would do well for her, was ſufficient to intitle her to the legacy."

(*o*) *E.* by his will, gave one ſixth part of her reſiduary perſonal eſtate to be placed out at intereſt, and the intereſt to be paid to her niece, *Mary Bradwin*, for life, and after her death one moiety of the one ſixth part to be paid to the ſaid *Mary Bradwin's* grand-children, the children of her daughter *Mary*, at their ages of 21; and the other moiety to be paid to *Ann*, the daughter of her ſaid niece, *Mary Bradwin*. *Mary Bradwin*, the niece, had two children, *Mary* the plaintiff, who was never married, and *Ann*, who married *B. R.* and died in the lifetime of the teſtatrix, and before the making of her will, leaving two children, *W.* and *R. Barnes*, the other plaintiffs. After the death of the niece, the ſuit was inſtituted, praying that one moiety of the ſixth part of the reſidue might be paid to the plaintiff *Mary*, and the other half to the two *Barnes's*, upon their attaining 21, on the ground that the teſtatrix ſo intended, but by a miſtake of names had given a moiety to the children of *Mary*, who never was married, and the other moiety to *Ann*, who was dead at the time of leaving the children. It was in evidence that the teſtatrix was eighty years old when ſhe made her will, and lived in *Derbyſhire*, and that *Mary Bradwin*, the niece, and her family, lived at St. *Alban's*, in *Hertfordſhire*, and that the teſtatrix had never ſeen her niece's children or grand-children. And the *Maſter of the Rolls* was ſatisfied of the miſtake, and the power of the court to ſet it right, by decreeing according to the intention, and after an objection for a want of parties had been removed, the property in diſpute, being of ſmall amount, and the plaintiff a pauper, his Honor decreed the money to be paid.

(*p*) *F.* by will created a truſt to pay an annuity to his

(*o*) Bradwin *v.* Harpur, Ambl. 374. (*p*) Parſons *v.* Parſons, 1 Veſ. Jun. CC. 266.

brother, *Edward Parsons*, for life, and after his death to go equally among his children by his present wife. At the time of making this will, he had no brother living except *Samuel Parsons*, who had a wife and children, but four or five years before, he had a brother named *Edward Parsons*, though he and his wife were dead at the date of the will; and other legacies were given by it to his children. The testator had been in the habit of calling his brother *Samuel* by the name of *Edward* and *Ned*. The bill was filed by the children of *Samuel*, and upon these circumstances, which were proved and admitted, the only question was, whether the testator intended his brother *Samuel*, when he named his brother *Edward*. And the Lord *Chancellor*, under the above circumstances, decreed an account according to the prayer of the bill, without argument.

(*q*) *G.* by her will, gave two legacies, one of 100l. and another of 300l. in this manner, "I give, direct, limit, and appoint 100l. other part of the said trust-money, to be paid by my trustees to the four children of my late cousin *Elizabeth Bamfield*, within six months after my decease, equally to be divided between them: if any or either of them should happen to die under twenty-one, or unmarried, their share or shares shall go to the survivors of them." The other legacy, which came at a great distance from the former, was worded thus: "I further give, limit, and appoint unto the children of my late cousin *Elizabeth Bamfield*, the sum of 300l." At the time of making the will the situation of *Elizabeth Bamfield*, was this: by a former husband, *Poddlecomb*, she had two children, the present defendant *William*, and the wife of the present plaintiff: she married *Bamfield*, by whom she had four children, who were living at the time of the death of the testatrix. The defendants insisted on reading parol evidence, to shew that the testatrix meant the four children by the last husband, *Bamfield*. And by Sir *John Strange*, *M. R.* "These two parts of the case fall under a quite different consideration. The distinction as to admitting parol evidence, I have always taken to be, that in no instance it shall be admitted in contradiction to the words of the will; but if the words of the will are doubtful and ambiguous, and unless some reasonable light is let in to determine that, the will will fall to the ground; any thing to explain, not to contradict, the will, is always admitted. So it is in the case of having two sons of the same name; what is gone upon that, as well as all the cases; it being doubtful there which the testator meant; and therefore when admitted in that case, it is not to contradict the words of the will, but to let in light so far agreeable to the words as to enable the court to support the act done. As to the 100l. legacy; it is agreed

(*q*) Hampshire *v.* Peirce, 2 Ves. 216.

she had six children; and it is not material whether they were by one husband or the other; but however that would be a proper ground to admit an explanation of this, what were the four children meant, for that does not contradict the will, but determines, which of the four children are to have that benefit. But as to the 300l. whether the evidence goes to that or not, I will not give weight to it; for there the devise is so expressed as to take in the whole of the children. Whatever her intention might be, is another question: I cannot go out of the will to admit it. The court has gone by the distinction before mentioned, and always cautiously admitted it: but as to the second legacy it would contradict the will. Had I been aware of this question, I could have mentioned cases; but I remember one where the executor made in a will, was, "My nephew *Robert New*," in the engrossment they had made it *Nune*. I am not certain, whether it was real estate or no: but there evidence was admitted, and on that he was declared to be the person. That was stronger than this; and it would hardly have done, if it had not been for the relative words *my nephew*; it appearing that he was his nephew, and that he had no such nephew as *Robert Nune*. Therefore let it be admitted: but I will not give weight to it on the last legacy." The evidence being read, his honour delivered his opinion to the following effect. "As to the 100l. which is an absolute bequest, the plaintiff insists it is not divisible between the four children *Elizabeth Bamfield* had by her second husband; but that, as she, who is the person named, and no notice taken of the husband, had six children, the word *four* ought to be rejected, and consequently the two children by the former husband let in with the four by the second: to prove which, stress is laid on the expression, the four children. I own, I should have had some doubt on this part of the case, if it did not so entirely correspond with the circumstances and situation of the family at that time. Here were not six children by one and the same husband, as it was in *Tomkins* v. *Tomkins*, (*r*) but two broods of children by different husbands; therefore it was natural in pointing out the number, to understand her pointing out that particular brood of number four, and so there is not that uncertainty, as if all the children had been by the same husband: but as there is some uncertainty, I have admitted the going into evidence to explain the intent of the testatrix in the expression *the four*, but excluded it as to the other legacy. The evidence laid before the court as to that is, that a woman servant was sent with instructions to some persons to draw the will: but I lay little stress on that; but he says, that the testa-

(*r*) *Supra*.

trix declared, and that more than once, for ſhe declared it before the ſending the inſtructions, that ſhe had provided for Mrs. *Bamfield*'s four Children. Now though the expreſſion in the will might take thoſe by the firſt as well as the ſecond huſband, yet this which I think, is proper evidence, ſhews plainly, that her declaration was the four children of Mr. *Bamfield*, thoſe he had by this wife; which explains, what ſhe meant by the *four* children: but ſhe alſo puts a negative on the other two, ſaying that ſhe would not give to the others, being the *Poddlecomb's*, any thing, becauſe their own father had given them a good fortune. So that taking this on the face of the will, in which alſo the circumſtances of the family muſt be taken altogether, it appears clearly that the four children by the ſecond huſband were thoſe meant to ſhare this 100l. Though no very great ſtreſs is to be laid on that clauſe of ſurvivor, yet in a caſe of this nature, ſome argument may be drawn from thence. The four children by *Bamfield* were all minors: the two children by *Poddlecomb* were both of age at that time. The teſtatrix put the caſe ſo as to take in the poſſibility, that any one of the four might die under 21, which the other two then could not. I ground myſelf much upon that correſponding ſo exactly with the number mentioned here: nor is there room to think the teſtatrix did not know the number of children *Elizabeth Bamfield* had by her huſband. So that the plaintiff or her brother have no ſhare as to that legacy of 100l. The other legacy ſtands on a very different foundation; and I cannot be warranted, whatever one might ſuggeſt to ones ſelf to be the intent, to depart from the words of the will, the taking in beyond diſpute all the children of *Elizabeth Bamfield:* ſo that I cannot conſtrue it reſtrictive to the four; for which there might have been a foundation, had there been any words of reference of any ſort to thoſe four children provided for by the 100l: but there are none throughout. Had this followed immediately after the 100l. legacy, and no other uſe had been made of the word further throughout this will, than what is contended for by the defendants, there might have been ſome room poſſibly to have reſtrained it, but it is at a great diſtance. It is a common expreſſion in every will, being an inchoation of a new deviſe, having no reference, as wrote in a diſtinct paragraph, and introduced with the word *Item.* It is not to the ſaid children, which might reſtrain it to the four: but it muſt be conſtrued all the children. It is material, that where the teſtatrix means to give to the ſame perſon more than ſhe has given before, ſhe has uſed the word *ſaid:* which ſhews, ſhe meant not to reſtrain this to the ſame objects to whom the 100l. was given, by not uſing the ſame expreſſion: nor is any ſtreſs to be laid upon her calling her by the name of *Bamfield.*

It is dangerous in questions of this nature, to depart from the plain words of the will, or admit any evidence to contradict them. Therefore I admitted the evidence as to the 100l. but would not apply it to the latter part; in the other it being explanatory, in this contradictory. It is said indeed, that the evidence read is adapted to defeat the plaintiff's demand as to both legacies. It may be so meant by the party, but it is the duty of the court to distribute and divide; to regard it so far as it is apt and legal; where not so, it is not binding on the court as to that. The bill therefore must be dismissed as to the 100l."

There is a case indeed which apparently stands in opposition to the above determinations, in regard to the rule of the court, in instances of imperfect descriptions of legatees: but that case is of very doubtful authority.—(*s*) *A.* by will, gave to the son and daughter of *W.* a legacy of 100l. *W.* had four sons and one daughter, and upon a question, which of the sons was entitled, it was determined that none of them should take the legacy, on account of the uncertainty in the description, but that the daughter should take the whole.

The last case certainly militates against the principle of every decision which has been made upon the subject; it was so considered by Lord *Thurlow*, in the case of (*t*) *Delmere* v. *Robello*, and his words in reference to *Dowset* v. *Sweet*, were as follow:—"It is almost impossible to say, that if there be a bequest to the son and daughter of one, who at the time of the bequest has four sons and a daughter, there is not such a dissonance between the state of the facts and of the bequest as to let in satisfactory evidence that *one* son was meant, as it is clear that he means one; it is within all the rules of *latent ambiguity*, therefore, I suppose that the case of *Dowset* v. *Sweet*, went upon the ground that the evidence was not sufficient to shew the intention, and then it became uncertain."

If however, there be an entire omission of the legatee's name or description, the omission will be fatal, and parol evidence cannot be admitted to supply the defect, and ascertain the legatee, for that would amount to a bequest by parol; *contra*, where a part of the name or description only is omitted.

(*u*) *A.* bequeathed all his personal estate to his executor, leaving a blank, and died without naming any person executor of his will; the legacy was adjudged void.

(*x*) *B.* gave 200l. to the Ward of *Bread-street*, according to Mr. ——, his will. And by Lord *Hardwicke*, C. "There are instances where the court has admitted parol evidence to ascertain the person intended by the testator, where he has been

(*s*) Dowset *v.* Sweet, Ambl. 175. (*t*) 1 Ves. Jun. CC. 415. (*u*) Winne *v.* Littleton, 2 Ch. Ca. 51. (*x*) Baylis *v.* The Attorney General, 2 Atk. 239.

mentioned only by a nickname, or where there have been two perſons who have had the ſame chriſtian and ſurname. But I do not remember any caſe, where the court has gone ſo far, as to allow parol evidence of the intention of a teſtator, where there is only a blank." His lordſhip therefore would not allow it to be read.

(*y*) *C.* deviſed her houſes in town, and at *R.* to her niece, Dame *Margaret Hort*, and *R. B.* her attorney, in truſt, to ſell; ſhe then gave ſome pictures ſpecifically, and proceeded thus, "My other pictures to become the property of Lady ——, (leaving a blank after Lady). My linen and clothes of all kinds, except laces, I give with 20l. to —— Scott," her ſervant, and made her niece *H. Hunt*, reſiduary legatee, whom ſhe recommended to the care of Lady *Hort*, and appointed Lady *Hort*, and *R. B.* executors. One of the queſtions was, whether Lady *Hort* was intitled to the pictures under the bequeſt to Lady ——? and againſt her claim it was inſiſted, that though it was probable Lady *Hort* was intended, yet her name being omitted, could not be ſupplied by parol evidence, there being no caſe where a blank had been ſo ſupplied. And the *Chancellor* ſaid, that as to this point, he had entertained a doubt whether as the firſt gift of the whole was to Lady *Hort*, in truſt, and then part of the pictures taken out, and the remainder to become the property of ——, (in oppoſition to a truſt) he could not ſupply Lady *Hort*'s name, without a reference to the maſter: but upon conſideration, he was of opinion, that he could not ſupply a blank by parol evidence, that where there was only a title given, it was the ſame as a total blank; that by a blank added to a general legacy, no perſon was referred to, and therefore he thought it would be too much to give the pictures under theſe circumſtances to Lady *Hort*."

(*z*) *D.* by his will, after giving ſome legacies, bequeathed to —— Price, the ſon of —— Price, the ſum of 100l. No other perſon but the plaintiff claimed the legacy, and he produced evidence from which it appeared, that he was the ſon of a niece of the teſtator; that his father's and grand-father's name was *Price*; that the teſtator had no other relation of that name, that he lived on terms of affection with the plaintiff, contributed to his maintenance, placed him with an attorney, and paid the duty on that occaſion, and that the teſtator ſaid that he had or would provide for the plaintiff, and that he had left him ſomething by his will. The executors diſputed the plaintiff's right, and urged, that it had been determined that a legacy to Lady ——, was void (*a*). But by the *Maſter of the Rolls*,

(*y*) Hunt *v.* Hort, 3 Bro. CC. 311. (*z*) Price *v.* Page, 4 Veſ. Jun. CC. 680. (*a*) The laſt caſe.

" this is quite a different caſe. This is only that the teſtator did not know the *chriſtian* name. I am perfectly ſatisfied by this evidence: but if the executors inſiſt upon an inquiry and an advertiſement, they muſt have it, but after this evidence and the length of time that has elapſed without any other claim, there can be no doubt. The plaintiff's father can have no claim. There is poſitive evidence, that the teſtator contributed to the plaintiff's maintenance, placed him with an attorney, ſaid he would provide for him, and had left him ſomething by his will." An enquiry not being deſired, the plaintiff obtained a decree for the legacy.

When a perſon to whom a legacy is given, is correctly named, but a wrong deſcription or addition is given to him, the falſe deſcription or addition will not vitiate the bequeſt, but be rejected; for it is a maxim that *veritas nominis tollit errorem demonſtrationis* (*b*). Thus in the caſe of *Standen* v. *Standen*, (*c*) *C. M.* by his will gave 200l. to truſtees in truſt, to place " *Charles Millar Standen*, and *Caroline Eliz. Standen*, legitimate ſon and daughter of *Charles Standen*, now reſiding with a company of players," apprentices, as the truſtees ſhould think fit. The teſtator then directed his real eſtate to be ſold, and gave the money with the reſidue of his perſonal eſtate in truſt for his wife for life, and after her death, as to one moiety for ſuch perſon or perſons as ſhe ſhould by deed or will appoint, and which ſhe afterwards diſpoſed of by will. And as to the other moiety in truſt for " *Charles Millar Standen*, and *Caroline Eliz. Standen*, legitimate ſon and daughter of *Charles Standen*," equally, with ſurvivorſhip between them, if either died before 21 or marriage, with a further limitation if both of them died before the arrival of either of thoſe periods. It appeared that *Charles Millar Standen*, and *Caroline Eliz. Standen*, were illegitimate children, and one of the queſtions was, whether they could take under the wrong deſcription of legitimate children? —It was contended for them, that an inaccurate deſcription of a legatee would not deſtroy the effect of a legacy given to him *nominatim*, therefore they were intitled to the benefit of the 200l. and the moiety over which the widow had no power of appointment. And the *Lord Chancellor* was of the ſame opinion, and decreed accordingly.

If, however, the deſcription that is erroneous, be applicable to another perſon, ſo as to render it doubtful whether the perſon named, or the perſon deſcribed, were intitled, the bequeſt would be void for uncertainty. Suppoſe then a legacy given to *C.* of *L.* in the pariſh of *M.* as grand-daughter of the teſtator, when in fact *C.* was his great grand-daughter, but neither of *L.* nor in the pariſh of *M.* but *D.* though not anſwering the

(*b*) Lord Bacon's max. reg. 25. (*c*) 2 Veſ. Jun. CC. 589. Dare *v.* Geary, cited Ambl. 375, S. P.

deſcription in name, was the teſtator's grand-daughter, and reſident at *L.* in the pariſh of *M.*; unleſs it were in proof that the teſtator miſtook the name of *C.* for that of *D.* the wrong deſcription would defeat the bequeſt. This will be more fully illuſtrated by the following caſe—

(*d*) This was an ejectment tried in 1796, at the ſpring aſſizes for *Hereford*, to recover a houſe known by the name of the *Star Inn*, in *Water-ſtreet*, in the borough of *Caermarthen*, of which one *George Evans*, died ſeized in fee, in April, 1779, having by his will, after ſeveral deviſes, proceeded thus: "*Item*, I give to my four daughters, *Margaret*, *Anne*, *Mary*, and *Elizabeth*, one ſhilling each. *Item*. I give to my three grand-children of *Llanteway*, *Anne*, *Elizabeth*, *and Elinor*, 40l. each. *Item*, I give to my grand-daughter *Elinor Evans*, of *Merthyr* pariſh, 40l. *Item*, I deviſe to my grand-daughter, *Mary Thomas*, of *Llechlloyd*, in *Merthyr* pariſh, the reverſion of the houſe in *Water-ſtreet*, (the premiſes in queſtion) the ſaid houſe being to continue in the poſſeſſion of my wife *Elizabeth Evans*, during her widowhood." At the time of his death, the deviſor had a grand-daughter of the name of *Elinor Evans*, one of the leſſors of the plaintiff, who lived at *Llechlloyd*, in *Merthyr* pariſh, and a great grand-daughter, *Mary Thomas*, the defendant, an infant, of about the age of two years, the grand-daughter of his eldeſt daughter *Margaret*, by her ſecond huſband *John Thomas*, being the only perſon of that name in the family; but it appeared that ſhe lived at *Green-caſtle*, in the pariſh of *Llangain*, ſome miles from *Merthyr* pariſh, in which latter pariſh ſhe had never been in her life. The other leſſors of the plaintiffs were the heirs at law of the deviſor. At the trial, the plaintiff's counſel propoſed giving parol evidence, to ſhew a miſtake in the name of the deviſee; that when the will was read over to the deviſor, by a Mr. *Phillips*, who drew it, and who is ſince dead, the deviſor ſaid that there was a miſtake in the name of the woman to whom the houſe was given, that *Phillips* then ſaid he would rectify it, but the deviſor anſwered that there was no occaſion, as the place of abode and the pariſh would be ſufficient. To this evidence the defendant's counſel objected, contending that there was not that *ambiguitas latens* which authoriſed the receiving of parol evidence. That if the doubt had ariſen from there being two perſons of the name of *Mary Thomas*, parol evidence might be admitted to explain which of them was meant; but that here the inaccurracy of the deſcription was not ſuch as to raiſe a ſufficient degree of doubt to let in the parol evidence, for grand-daughter would properly enough ſignify great grand-daughter;

(*d*) Thomas *v.* Thomas, 6 Term Rep. K. B. 671.

and the miſtake of the reſidence was only in a matter of deſcription which was perpetually varying, and could not raiſe any doubt where a name not applicable to any other than the defendant was uſed, which is a circumſtance of the greateſt weight in theſe caſes. But *Lawrence*, J. received the evidence ſubject to the opinion of the court on its admiſſibility, in caſe the jury ſhould be of opinion that the name *Mary Thomas*, had by miſtake, been inſerted inſtead of *Elinor Evans*; but the jury being of opinion that there was no ſuch miſtake, they were directed to find for the defendant on the firſt count, laying the demiſe from *Elinor Evans*, and her huſband, which they accordingly did; and conſequently any further conſideration of this point became unneceſſary. The defendants' counſel then offered evidence of declarations made by the deviſor at other times previous to the making of his will, expreſſive of his regard for his great granddaughter the defendant, and of his intention of giving her the *Star*, in *Water-ſtreet*. This evidence was rejected by the judge, who thought that nothing *dehors* the will, could be received to ſhew the intention of the deviſor, which could only be collected from the words of the will itſelf, after the removal of any latent ambiguity there might be in the deſcription of perſons, or other terms made uſe of in the will. And the jury under his direction, found for the plaintiff, on the ſeveral counts which were on the demiſes of the heirs at law, on the ground that the deviſe was void for uncertainty; the defendant having liberty to move the court to enter a nonſuit if they ſhould be of a different opinion, and ſhould think that the great granddaughter *Mary Thomas*, might take under the will. And a rule to ſhew cauſe having been obtained, Lord *Kenyon*, Ch. J. thus expreſſed himſelf. "Although great pains have been taken by the counſel on both ſides, to inveſtigate the points in this cauſe, it ſeems to be a caſe of no difficulty. It muſt be admitted that the heirs at law are not to be diſinherited by conjecture, but only by expreſs words, or neceſſary implication. When the rule for a new trial was moved for, I alluded to the maxim, that *falſa demonſtratio non nocet*, but in doing ſo, I wiſhed that the ſenſe of that rule ſhould be attended to. I have always underſtood that ſuch *falſa demonſtratio* ſhould be ſuperadded to that which was ſufficiently certain before, there muſt *conſtat de perſonâ*, and if to that an inapt deſcription be added, though falſe, it will not avoid the deviſe. And this gets rid of almoſt all the obſervations and arguments made by the defendants' counſel, for in the caſes cited, there was no other perſon in competition with the perſon claiming. It has been a long eſtabliſhed rule, that where there is a latent ambiguity in a will, the parties may go into extrinſic evidence to render that certain, which without the aid of ſuch evidence, is uncertain.

But here, the evidence given, has itſelf raiſed the ambiguity. On the face of the will there is no uncertainty; one perſon, (viz.) *E. Evans*, is named, who is the grand-daughter of the deviſor, and of *Llechlloyd*, in *Merthyr* pariſh; two of the deſcriptions therefore in the conteſted deviſe apply to her. But inſtead of her name, (it was ſaid) that the name of *Mary Thomas*, was inſerted; it turns out that *Mary Thomas* is not the grand-daughter, but the great grand-daughter of the deviſor, and that ſhe does not live at *Llechlloyd*, in *Merthyr* pariſh, the place mentioned in this clauſe. Then do we arrive at any certainty reſpecting the perſon of the deviſee? If we do, it muſt decide the caſe; but if the parol evidence has introduced uncertainty reſpecting the deviſee, then the heirs at law muſt take. In addition to the caſes that were cited, another in *P. Williams* (*e*), might have been referred to; where the name of the legatee was miſtaken; the teſtator gave a legacy to *Catherine*, it turned out that there was a perſon whom he frequently called *Gatty*, and not according to her real name, which was *Gertrude*, and when parol evidence of that was received, it left no doubt but that the teſtator meant *Gatty*. So here it was proper to let in the parol evidence to remove the latent ambiguity, but when received, it leaves the queſtion in uncertainty. If there had been no perſon anſwering the deſcription of grand-daughter, living at *Llechlloyd*, in *Merthyr* pariſh, I ſhould have rejected the deſcription, and have ſaid that the deviſe applied to *Mary Thomas*; but it appears that there is another perſon anſwering that part of the deſcription, who is alſo an object of the teſtator's bounty. Then as there are two parts of the deſcription not anſwering to *Mary Thomas*, who is named in this clauſe in the will, we are left to conjecture, who was meant by the deviſor: but the law will not allow an heir at law to be diſinherited by conjecture. With regard to the other queſtion reſpecting the rejection of evidence, it ſeems that the learned judge did right in rejecting it, the ſuppoſed declarations having been made by the teſtator long before the will was made, though had they been made at the time of making the will, I ſhould have thought them admiſſible in evidence." The other judges concurred in this opinion, and *Lawrence*, J. before whom the cauſe was originally tried, thus expreſſed himſelf; "I received parol evidence for one purpoſe, and rejected it for another, on this ground; I thought that I could not receive parol evidence of declarations of the teſtator relative to his intention made before the will, but that parol evidence might be received to remove a latent ambiguity, not appearing on the face of the will, or to clear up a miſtake

(*e*) Beaumont *v.* Fell, *ſupra*.

of a name in the will. As the deſcription in the clauſe in queſtion anſwered to *E. Evans*, and as it was ſtated that the deviſor at the time of making his will, ſaid that he meant that *E. Evans*, ſhould take under it, I permitted the counſel for the plaintiffs to go into parol evidence, to ſee whether or not the name of *Mary Thomas*, were by miſtake inſerted for that of *E. Evans*. And in ſo doing, I found myſelf warranted by former deciſions: 8 Vin. Abr. 312, pl. 29, and 2 Veſ. 216. With regard to the evidence which was rejected, I thought that a will could not be conſtrued by any declarations made by the teſtator, before the making of the will, but that his intention muſt be collected from the words of the will, or from what paſſed at the time of making it. There is no doubt but that the parol evidence to remove the latent ambiguity in the will was properly received; but when it was received, it became extremely doubtful who was intended to take. I perfectly agree with the opinion given by my Lord Chief Juſtice on this point: if the parol evidence had clearly ſhewn who was intended to take, that perſon would have been intitled to our judgment: but if the parol evidence does not remove, but raiſes the doubt, then the title of the heirs at law muſt prevail. In many caſes the deſcription of the deviſee is of importance. Suppoſe a deviſe of a houſe to *A.* by name, on condition that he keep up the houſe, &c. and it turned out that *A.* was of too tender an age to keep houſe, the perſon ſo named could not take, becauſe it is evident from the deſcription, that the deviſor did not mean that perſon ſo named. The caſes cited only apply to a caſe, where there is only one perſon, reſpecting whom the ambiguity ariſes; if that had been the caſe here, if there had been no perſon anſwering the deſcription in this clauſe, *Mary Thomas*, who is named, might have taken, and the deſcription might have been rejected: but here the deſcription, both as to the degree of relationſhip, and as to the place of reſidence, does apply to another perſon, therefore it is uncertain whom the deviſor meant, and conſequently the heirs at law muſt take." Rule diſcharged.

It was ſaid in argument, in the caſe of *Brett* v. *Rigden*, (*f*) that if a bequeſt were made to the wife of *J. S.* and *J. S.* afterwards died, whoſe widow thereupon married *J. D.* and then the teſtator died, the wife of *J. D.* would be entitled to the legacy, although ſhe was not the wife of *J. S.* at the time the will took effect, and therefore did not anſwer the deſcription at that period.

(*f*) Plowd. 344, b.

CHAP. V.

Of Veſted Legacies.

SECT. I.] Of Veſted Legacies, payable out of perſonal Eſtate.

COURTS of Equity, not being poſſeſſed of excluſive juriſdiction in legatory matters, but the eccleſiaſtical court holding a concurrency with them on ſubjects of this nature, have, in order to preſerve uniformity of deciſion, adopted ſome of the rules of the eccleſiaſtical court, which were taken or borrowed from the *Roman* law (*a*). In conſequence of this adoption, courts of equity have eſtabliſhed a general rule of conſtruction, that when a legacy is given to *A. to be paid*, or *payable*, at or when he ſhall attain the age of 21, or at any other determinate period, the legacy will be conſidered veſted in *A.* immediately, as *debitum in præſenti ſolvendum in futuro*, the time being annexed to the payment only, and not to the legacy itſelf: and if *A.* ſhould happen to die before the arrival of the day of payment, his aſſignee or perſonal repreſentative, will be entitled to the legacy (*b*). Thus—

(*c*) *A.* bequeathed "400l. to *R.* to be paid to him at the end of one year next after my death, and the further ſum of 100l. at the death of his mother." *R.* having died in the life of his mother, the queſtion was, whether he took a veſted intereſt in the legacy of 100l.? And by the Lord *Chancellor*, "As to the 100l. legacy, it is plainly veſted, and the time of payment only poſtponed, for the former words *to be paid*, muſt be carried on, as they would plainly be, if turned into any other language."

(*d*) *B.* bequeathed to her brother *James Snowden*, 2000l. and 500l. to each of his children; to her brother-in-law, *James Winter*, 1000l. and to his daughter *Catherine*, 1500l. and after ſeveral other diſpoſitions, ſhe gave the reſidue of her real and perſonal eſtate to *Snowden* and *Winter*, in truſt, to place out upon government or real ſecurities, and pay the intereſt or dividends to her mother for life, and after her death, the teſtatrix gave the principal to the daughter of *James Winter*, and to the lawful children of her (the teſtatrix's) brothers *John Snowden* and *James Snowden*, to be equally divided between them; the ſhares of the ſons with the intereſt or accumulations there-

(*a*) Hanſon *v.* Graham, *infrà*. (*b*) Swinb. 30, Bro. Abr. "Conditions," pl. 187. 2 Roll, Rep. 134. Stapleton *v.* Cheales, Ch. Pre. 317. (*c*) Jackſon *v.* Jackſon, 1 Veſ. 217. (*d*) Bolger *v.* Mackell, 5 Veſ. Jun. CC. 509.

of, *to be paid* at their ages of 21, and thoſe of the daughters at 21 or marriage, after a deduction of what might be laid out for their maintenance and preferment in the world. After the teſtatrix's death, *John Snowden* died without iſſue, and *James Snowden* at his death, left two ſons, who died under 21, inteſtate and without iſſue, leaving their grand-father *J. N.* their adminiſtrator and next of kin. Upon a ſuit inſtituted in 1779, by *Catherine Winter*, then an infant, and her father, the *Maſter of the Rolls* decreed one third part of the reſidue to be carried to the account of *Catherine Winter*, and the remaining two thirds to the account of the perſonal eſtate of *J. N.* then deceaſed, in the cauſe, &c. the adminiſtrator of the two ſons of *James Snowden*. *Catherine Winter* having attained 21, and married *C.* they filed a bill againſt the executors of *J. N.* &c. for a reverſal of the above decree, inſiſting that the reſidue did not veſt in any of the legatees before 21, or if daughters, before 21 or marriage, and claiming the whole reſidue, as the two ſons of *James Snowden* died under 21. And the Lord *Chancellor* after noticing that this was the caſe of a reſidue, and that it was difficult to argue upon the intention when it would produce a partial inteſtacy, proceeded "I obſerved in the former caſe," *Mackell* v. *Winter* (*e*), "that the diſtinction," when the time is annexed not to the gift of the legacy, but to the payment, "was founded in this, that it is a diſtinction ſettled undoubtedly in the eccleſiaſtical court from the *Roman* law. This court has not adopted it where it is not compelled, as to land: there is alſo the conſideration for the heir as to that. I ſee from the report of that caſe, I intimated, that if it were not for the circumſtances in that caſe, I felt myſelf compelled to follow the rule. The deciſion of the courts as to the perſonal eſtate, muſt be uniform. But what governed my opinion in that caſe, was, that I muſt have ſtruck out of the will the limitation over by holding that thoſe were veſted legacies; for there could not be a caſe, in which that limitation could take effect: the legatee over taking nothing but in the event of the deaths of the grandſons under 21, and of the grand daughter under that age and unmarried; and alſo there was a very clear, though not a very well expreſſed intention in the will, that there ſhould be croſs remainders. In this will it is a mere tenancy in common. There is nothing to ſhew an intention of ſurvivorſhip, or that one ſhould take, if the other ſhould not arrive at the time marked out. This is a mere bequeſt of the reſidue of perſonal eſtate, *payable* at 21. The rule muſt take place; and the mere addition of a direction, that maintenance ſhall be deducted, will not prevent it. Therefore the bill muſt be diſmiſſed."

(*e*) Stated *infrà*.

The caſe above alluded to, may ſeem at firſt ſight to contradict the general rule; but that caſe will appear on peruſal to be an exception only, it having been decided upon the particular circumſtances.—The caſe was as follows—

(*f*) *A.* bequeathed the reſidue of her eſtate to her two grandſons, and to her grand-daughter *Catherine Winter*, equally, the ſhares of her grand-ſons, with the intereſt or accumulations thereof, after a deduction for their maintenance and education *to be paid to them at* 21, and the ſhare of her grand-daughter, with the intereſt or accumulation thereof, *to be paid to* her at 21, or day of marriage, and ſhe directed her executors to pay for the maintenance and preferment of her grandſons, out of the intereſt of their ſhares of her reſiduary eſtate, ſuch ſums of money as they her executors ſhould think proper, and appointed them guardians of her grand-children; and the teſtatrix declared, that if her grand-daughter died under 21 and unmarried, her ſhare of the reſidue with the intereſt accumulated thereon ſhould be equally divided between the teſtatrix's two grandſons, and in caſe of either of their deaths the whole to be paid to the ſurvivor; and if either of them died under 21, his ſhare ſhould go to the ſurvivor, and in caſe both her grandſons ſhould die under 21, and if her grand-daughter ſhould die under 21 and unmarried, then the whole of their reſpective ſhares of the reſidue with the accumulations, was to be paid to *J. B.* and in caſe of his death to his children, &c. Both grandſons having died under 21, the repreſentative of the ſurvivor filed his bill, praying to be declared intitled to two third parts of the reſidue in the event of the grand-daughter attaining 21 or marrying, the former of which events ſhortly afterwards happened; and the *Maſter of the Rolls* determined with reference to the above rule or diſtinction, that the repreſentative of the ſurviving grandſon was intitled to the relief he prayed, as the grandſons in his opinion, took veſted intereſts in their ſhares. But the Lord *Chancellor*, on appeal was of a different opinion, and expreſſed himſelf to the following effect:—"The general plan of this will is ſo extremely obvious, that it is impoſſible to have any doubt as to the general ſcope of the intention. The teſtatrix had three grand children: two boys by a deceaſed ſon; one girl by a deceaſed daughter, all very young; and theſe children were the natural objects of her affection. It is very evident, that the ſole purpoſe of the will, was to make a proviſion for theſe grand-children, ſuch as might be moſt beneficial to them, with an extremely natural view, that one or other of them would be poſſeſſed of all her fortune: but it was a poſſible event from their age, that none of them might arrive at the time, when it would be material for them to be poſſeſſed of it;

(*f*) Mackell *v.* Winter, 3 Veſ. Jun. CC. 236, 536.

and in that event it was natural to substitute the nephew, if he he should be alive, or if not his children. For this purpose she puts the children and her fortune under the management of the persons she appoints executors: she directs them to dispose of the residue of her property in order to form an income: the application of that income is to give maintenance to each of these grand-children upon that portion, that would ultimately belong to that child, with a power as to the grandsons to advance out of the income what should be necessary for preferment. The preferment of the grand-daughter was her marriage, upon which she became entitled to one third with the accumulation. With regard to the others as they were brothers, descended from the son, survivorship is distinctly expressed between them: likewise it is distinctly expressed, that in case the grand-daughter should die under the age of 21, or unmarried, her share with the accumulation shall go to the grandsons, and in case of the death of either, to the survivor. The will is not by any means accurately drawn. It is of necessity to explain one part of it by another: for instance, there is a different mode of giving the interest to the grand-sons and to the grand-daughter: to the former it is by gift and direction for payment; it is merely a gift to the grand-daughter.—That is mere mistake. So in one instance there is no disposal of the accumulation. That also is pure mistake, and an inaccuracy in the drawer of the will; for it is very clear that all was to go over, that was not expended in maintenance. As to the grand-daughter, either her marriage or attainment of the age of 21, would have fixed the interest in her; and not only according to the frame of the will, but the clear scope of the intention; her marriage or attainment of that age would have totally defeated the gift over to the nephew. Upon that event the personal representative of the surviving grandson, who in the event is the representative of both, claims to be entitled to two thirds of this fortune, as vested in the survivor of the grand-sons; the grand-daughter contends that she is entitled to the whole; the nephew is brought in as a party: I do not know why, for the claim of his family is completely barred. As between the plaintiff and the grand-daughter the question is purely a question of intention: both claim under the will, both must find therefore in it some express direction or some necessary implication to give to the one or the other of them. A third case may happen that never can be a question of intention; that if the disposition of the will has been imperfect, and a case has existed, in which any part of the property is undisposed of, not according to the intention, but contrary to the intention and by a slip in the will, the personal representative or next of kin would be entitled. His Honor has adopted that construction of the will, that vests the interest in the

ſurviving grand-ſon. It is therefore neceſſary to conſider, whether I can find in this will any ſpark of intention to veſt this intereſt in two thirds of the bulk of the fortune, with the accumulation in a grand-ſon dying under the age of 21? firſt, it is an obvious remark, that it is an exceſſively whimſical, extravagant, and abſurd intention: becauſe it is quite evident that *quoad* the nephew, the poſtponed object of bounty, who was to take nothing in reſpect of the prior intereſt of the grand-children, there could be no veſted intereſt in any one dying under 21, for if all died under 21, the nephew was to take all. The ſuppoſition therefore, that veſts it in the grand-ſon dying under 21, which could not poſſibly take effect with regard to the nephew, veſts it ſolely for the purpoſe of taking it from the grand-daughter. It ſeems his Honor felt himſelf under this ſort of difficulty, apprehending that there were ſome certain words in the will that forced him to put the conſtruction upon it of a veſted intereſt in the grandſon, and that there was nothing that would afterwards take it from him; that in the firſt conception of the phraſe, there was to each of the three grand-children an expreſs gift, and that payment only was poſtponed, and that there was an expreſs gift over in the event of the death of the grand-daughter, but no expreſs gift over in the event of the death of the grandſons. Then it comes to that rule, that one meets within many caſes, and which never is treated with much reſpect, and in which the court has rather followed the authority of another juriſdiction, *viz.* where a teſtator ſays "I give at 21," and where he gives "payable at 21." There is not much difference in it: but the court has followed it as to perſonal legacies, certainly not as to real eſtate. It is not a rule founded upon any principle of interpretation; but it is a *poſitive rule*, and as ſuch I ſhould feel myſelf under the ſame difficulty that other Judges have felt, who finding it a poſitive rule of the eccleſiaſtical court, have thought it better to adhere to it: but it muſt be confined to ſuch caſes; and ſo confined, I ſhould feel myſelf bound to follow it. But when one reads this will, it is very true, if you take the will to pieces, and ſtop at the firſt part of the diſpoſition without going on to the cloſe of it, there is a gift to the grandſons, to be paid to them reſpectively, upon their attaining their ages of 21: to the grand-daughter ſhe gives at the age of 21 or day of marriage: the diſtinction, therefore, would not apply to the caſe of the grand-daughter, but there is clearly no difference in the ſenſe. But what is given? you muſt not reſt upon the letter of the will, and take the firſt part without going through the other. Nothing is given to either the grand-ſons or the grand-daughter but maintenance. The income only is the ſubject of diſpoſition in this part of the will, and that income is only

charged with maintenance. The income is not given. That is all the ſubject of the gift till the period of majority or the marriage of the grand-daughter, and then only commences the diſpoſition of the principal. Therefore it is a neceſſary term that the perſon to take ſhall be a grandſon in a ſtate of majority, or a grand-daughter in a ſtate of majority, or having married. This brings it within a very ſenſible line taken by Lord *Thurlow*, whether marriage or attaining the age of 21, or any other perſonal qualification is not a neceſſary part of the deſcription. Therefore the rule that embarraſſed the *Maſter of the Rolls*, does not fetter the court. I am perfectly clear, as he alſo was, that it could not be the intention to veſt the intereſt in a grandſon, to carry it over to the perſonal repreſentative, who happened here to be the grand-father, which was not intended in the caſe of the nephew's intereſt taking place. Therefore concurring with him in this wiſh, but differing as to the capacity of the court to execute it, I muſt reverſe that part of the decree, that declares this a veſted intereſt. Then comes the other queſtion, which has more difficulty. I think however, it is very evident, and ſo evident as to amount to neceſſary implication, that the grand-daughter takes the whole. The whole is given over to the nephew in caſe neither the grandſons, nor the grand-daughter ſhould attain the age of 21, or the latter be married. The nephew cannot take a part. The whole fund with all the accumulation muſt go to him in every caſe, in which he can take. For what purpoſe then is the intention to give it to the nephew defeated, but for this plain and evident purpoſe, that he in a remote degree of relation and affection was to take nothing to the prejudice of either of the grand-children. He is preferred to the perſonal repreſentatives and the next of kin. That neceſſarily implies that what defeats the gift over to the nephew muſt be a diſpoſition of the whole to the preferable objects of the teſtatrix's bounty named; and I think the inference againſt a partial inteſtacy, is quite a neceſſary inference and a clear implication in favour of the grand-daughter. Reverſe therefore ſo much of the decree as declares, that two thirds veſted in the ſurviving grandſon, and declare that the whole is to be paid to the grand-daughter."

It is alſo a rule of conſtruction, that when the time appointed for payment of a legacy, is annexed to the very ſubſtance of the gift, the legacy will not veſt in ſuch caſes, before the legatee arrives at that age. The following expreſſions have been adjudged to unite the time of payment eſſentially with the bequeſt, viz. I bequeath to *A.* 100l. *at*, or *if*, or *when*, or *provided* he attains 21 (*g*).

(*g*) Stapleton *v.* Cheales, Ch. Pre. 317.

(*b*) *A.* bequeathed in this manner, "I give 100l. a-piece to the two children of *J. S.* at the end of ten years after my decease:" the children died within the ten years, and by Lord *Cowper*, C. "This is a lapsed legacy, and shall not go to the executors of the children, for the diversity is where the bequest is to take effect at a future time, and where the payment is to be made at a future time." And though it was objected, that this differed from the case where a man devised 100l. to *J. S.* at his age of 21, because it was a contingency whether he should attain to that age, but the expiration of the ten years was inevitable, yet the Lord *Chancellor* answered, "That wherever the time is annexed to the legacy, and not to the payment of it, if the legatee die before the time of payment, it is a lapsed legacy."

(*i*) *B.* being possessed of a considerable personal estate in *Jamaica* and in *England*, by his will made the following bequest, "I give to *J. S. now* under the custody of *R. D.* the sum of 2000l. at the age of 21 years, to be *paid* by my executors in *England*." *J. S.* having survived the testator, and attained his age of 18, made his will, and gave the above legacy to *C.* and the question was, whether it was well bequeathed to *C.*? which depended upon this, whether *J. S.* took a vested interest in the 2000l. before he attained 21? And it was determined against *C*'s claim, as the legacy to *J. S.* was contingent until he attained 21. The *Chancellor* observing that the word "now," was merely descriptive of the condition of the legatee, and that the word "paid" was only applicable to the persons by whom the money was to be paid.

(*k*) *C.* bequeathed to his eldest son *C. B.* 200l. "at his age of 21." *C. B.* died under that age, without having been ever married, and it was admitted on all sides, and also by the court, that the 200l. never vested in *C. B.* as it was given to him *at his age* of 21, and not *payable* at his age of 21, so that the age was annexed to the gift, and not to the *time of payment*, consequently it was not an interest transmissible to his executor or administrator.

(*l*) *D.* bequeathed in this manner, "I give two thirds of three eighths of my joint stock and trade to my grand-son *R. T. provided* he shall attain his full age of 21 years, but if he die before 21," then remainder over, &c. *R. T.* died before 21. The question was, if the administrator of *R. T.* was intitled to the intermediate profits between the death of the testator and the death of the infant? And by the *Master of the Rolls*,

(*b*) Smell *v.* Dee, 2 Salk. 415. (*i*) Onslow *v.* South, 1 Eq. Ca. Abr. 295, pl. 6. (*k*) Cruse *v.* Barley, 3 P. Will. 20. (*l*) Atkinson *v.* Turner, 2 Atk. 41.

"The whole turns upon this, whether this was such an interest as vested during the minority of *R. T.* or whether it was suspended during his minority, and divested upon his dying before 21? Considering it upon the words of the will, I own I think it a very strong case as a condition precedent, and that the estate could not vest till the infant attained the age of 21. Nothing is more frequent than a future interest in a chattel, and there is no instance where the court strains to make it a vested one, till the future time comes *in esse*. The only difference in the present case is, that this legacy is not properly money, but the partnership and profits of a trade. The more general a rule is made the better, and it is very dangerous to run into niceties, to distinguish any particular case from a general rule, as it must necessarily breed uncertainty and confusion."—

The case of *May* v. *Wood*, (*m*) determined by Lord *Alvanley*, when *Master of the Rolls*, is certainly an authority, that a legacy given to a person *when* he shall attain 21, is not, without other circumstances, a *precedent* condition, so as to suspend the vesting of the legacy until the arrival of the period described, but a designation only of the time, when the legatee shall receive or have the full benefit of the thing given. That case as reported, was to this effect.—*A.* by his will bequeathed as follows: "I give to my daughters *Mary* and *Margaret*, the sum of 3000l. 5 per cent. navy annuities, and all the dividends and proceeds arising therefrom, to be equally divided between them, and all my estate at *St. Osyth*, to be equally divided between them, *when* they shall arrive at twenty-four years of age." One of the testator's daughters married the plaintiff *May*, and died, after she attained 21, but before she arrived at 24 years of age, the period mentioned in the above clause. Question, whether the plaintiff was intitled in right of his wife, to a moiety of the above legacy, which depended upon this, whether his wife took a vested interest in it before her age of 24? And by the *Master of the Rolls*, "The question arises upon the clause in the testator's will, containing the gift of the 3000l. navy annuities, to his daughter's *Mary* and *Margaret*. I must confess, that I have never entertained a doubt, as to the point, conceiving it to be perfectly settled in respect to principle, as well as construction; the only reason for deferring my judgment was, for the purpose of looking into the case of *Love* and *L'Estrange*, 3 *Brown, Parl. Cas.* 337, cited in *Monkhouse* and *Holme*, (1 Bro. CC. 298, which comprehends all the authorities upon this point, as to pecuniary legacies), which is adverted to by Lord *Loughborough*, as having been determined

(*m*) 3 Bro. CC. 471.

upon the ground of its being a *reſidue*. One does not know, upon what ground the judgment of the Lords might be founded, but upon the ſtatement of the caſe, it does not ſeem to warrant that obſervation; it not being, as I can diſcover, inſiſted upon by counſel on either ſide, in the caſe ſtated by them. So that it may be conſidered as a determination upon a general pecuniary legacy, and to fall within the reaſoning of the authorities upon this ſubject. It has been contended upon the part of the plaintiffs, that, according to the rule eſtabliſhed in all former caſes, this legacy muſt be conſidered as veſting *in præſenti*; and the period of twenty-four years annexed to it, is not a condition, but the time when the party ſhould be put into complete poſſeſſion. All the caſes eſtabliſh this principle, that where the time is mentioned, as referring to the legacy itſelf, unleſs it appears to have been fixed by the teſtator as abſolutely neceſſary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely poſtponed, not being annexed to the ſubſtance of the gift; but if it appears that the teſtator intended it, as a condition precedent upon which the legacy muſt take place, then if ſuch condition or contingency does not happen, the gift never ariſes. It has, therefore, been inſiſted by the defendant's counſel, that the word *when* muſt be conſidered as ſynonimous to *if*, it is univerſally ſo, where the word *if* is uſed, as denoting a condition annexed, and therefore in ſuch a caſe the legacy cannot take place. Here the words are, *to be equally divided when they ſhall arrive at* 24 *years of age*; the latter words relate to the whole of the preceding ſentence, and it is not for me to conſider, whether the words *to be equally divided* make any difference, and I do decide this point *without any reference to thoſe words*. *Atkins* v. *Hiccocks*, 1 Atk. 500, (*n*). has been cited upon the part of the defendant, and from that authority, it ſeems clear, that if it had not been for the circumſtance of its being *payable* at the day of marriage (but *at any other time)* Lord *Hardwicke* would have deemed it merely as a poſtponing the payment of the legacy; but he conſidered the period of marriage as the eſſential requiſite, and the very conſideration for which the legacy was given, and as that time, namely, the day of marriage never arrived, his Lordſhip held it could not take effect. As to *Onſlow* v. *South* (*o*), there the words annexed the time to the ſubſtance of the legacy, being *at* 21, and therefore the gifts never aroſe until the time actually arrived, and the word *now* was much relied upon, but ſurely it could not amount to any thing more than to deſcribe the identity of the perſon. It has been argued for the defendant that

(*n*) *Infrà*. (*o*) *Suprà*.

the teſtator could never be ſaid to give the legacy until the time actually came when he declares that the gift ſhould take place. Theſe have been *the caſes relied upon:* and it has been alſo contended, that according to the true conſtruction of this clauſe the word *when* muſt be ſynonimous to *if*, and conſequently that the legacy never veſted. Has the court ever adopted ſuch a conſtruction? On the contrary all the caſes for full half a century upon pecuniary legacies, have determined that word, not as denoting a condition precedent, but only marking the period when the party ſhall have the full benefit of the gift, except ſomething appears upon the face of the will, to ſhew that his bounty ſhould not take place, unleſs the time actually arrived, and not merely where he has uſed the word *when*, for the ſole purpoſe of poſtponing the time of payment. *Roden* v. *Smith*, Ambl. 588 (*p*), has been cited for the plaintiff, which recognizes the general principle, but there the queſtion was as to the payment of the legacy to the legatee's adminiſtrator, whether he ſhould receive it immediately, or wait till it would have been payable to the party himſelf. The court held that he could not be in a better ſituation than the legatee himſelf. As to *Love* v. *L'Eſtrange*, I cannot approve of any diſtinction between a reſidue and a pecuniary legacy (*q*): the word *when*, would apply equally to both caſes, and therefore that caſe muſt be analogous to the preſent. A very ſtrong authority has alſo been cited, as to the conſtruction of the word *when*, in reſpect of *realty*, from 3 Term. Rep. 41, where Lord *Kenyon* conſtrued this word in the ſame manner. I am therefore of opinion that according to the true rule of conſtruction this word cannot be otherwiſe conſidered, than as denoting the period of payment, and muſt not be deemed a condition precedent, upon which a legacy was to veſt, but merely poſtponing the payment of this 3000l. with the dividends thereon till 24; and declare that the plaintiff as the adminiſtrator of his late wife is intitled to a moiety of the 3000l. 5 per cent. navy annuities. The word *dividends* having been added by the teſtator, puts it out of queſtion whether he ſhall take it *now* or *hereafter*, when his wife would have arrived at 24, otherwiſe *Roden* v. *Smith*, muſt have guided the court upon this point, and I could not have ſaid that the adminiſtrator of the wife, ſhould have been put into a better ſituation than the reſiduary legatee, had not the word *dividends* been added, and therefore alſo declare the plaintiff to be entitled to all dividends due thereon, with coſts out of the general fund."

(*p*) *Infrà.* (*q*) In Booth *v.* Booth, ſtated *infrà*, the Maſter of the Rolls retracted this expreſſion, and approved of the diſtinction.

In peruſing the laſt caſe, it cannot eſcape the obſervation of the reader, that it is difficult to perceive any diſtinction between the gift of the legacy, and the time appointed for the payment of it. A legacy given to a perſon *when* he ſhall attain 21, the gift and the time of payment ſeem to be indiviſible. The above deciſion of Lord *Alvanley*, was very maturely conſidered by Sir *William Grant*, M. R. his ſucceſſor in *Hanſon* v. *Graham*, (*r*) and though that caſe did not require his honour to determine againſt the judgment given in *May* v. *Wood*, yet he was ſo well ſatisfied that the judgment was erroneous, as induced him to declare, that had there been no other circumſtance in the caſe before him, but his opinion had been requeſted as to the veſting or not veſting of the legacies given "to *B. C.* and *D. when* they reſpectively attained their ages of 21, or days of marriage" he would have decided that they did not veſt in the legatees before the happening of one of thoſe events. Sir *William Grant*'s judgment ſo far as it relates to the preſent ſubject, was as follows "it is contended that if the queſtion reſted upon a legacy, *when* the legatee ſhould attain the age of 21 or marriage, it is now ſettled that theſe words give a veſted intereſt, and that is eſtabliſhed by *May* v. *Wood*; and undoubtedly a propoſition is there laid down, which would have the effect of making this a veſted legacy, if it is true in the extent there ſtated. The propoſition is there laid down very broadly and generally by the late Maſter of the Rolls, that all the caſes for half a century upon pecuniary legacies have determined the word *when*, not as denoting a condition precedent, but as only marking the period, when the party ſhall have the full benefit of the gift, except ſomething appears upon the face of the will, to ſhew that his bounty ſhall not take place, unleſs the time actually arrived. This propoſition is ſtated ſo broadly and generally, that I rather doubt the correctneſs of the report. Conſidering the well known diligence of the late Maſter of the Rolls, in examining caſes, and his uncommon accuracy in ſtating the reſult of them, he would hardly have drawn this concluſion from an examination of the caſes, for no caſe has determined that the word *when*, as referred to a period of life, ſtanding by itſelf and unqualified by any words or circumſtances, has been ever held to denote merely the time at which it is to take effect in poſſeſſion; but ſtanding ſo unqualified and uncontrolled, it is a word of condition, denoting the time when the gift is to take effect in ſubſtance. That this is ſo, is evident upon mere general principles, for it is juſt the ſame, ſpeaking of an uncertain event, whether you ſay *when* or *if*, it ſhall happen. Until it happens, that which is grounded upon it

(*r*) 6 Veſ. Jun. CC. 239.

cannot take place. In the civil law, the words *cum* and *si* as referred to this subject, are precisely equivalent, and from that law we borrow all, or at least the greatest part of our rules upon legacies, and particularly the rule upon the subject immediately under consideration in that case, with reference to the words, by which a testator denotes his intention as to the gift taking effect, or taking effect in possession. In the digest (*s*) it is thus laid down: "*Si Titio cum* is annorum quatuordecim esset factus legatus fuerit, et is ante quatuordecimum annum decesserit, verum est, ad heredem ejus legatum non transire: quoniam non solum diem, sed et conditionem hoc legatum in se continet; si effectus esset annorum quatuordecim. Qui autem in rerum natura non esset, annorum quatuordecim non esse, non intellegeretur. Nec interest utrum scribatur, si annorum quatuordecim factus erit an ita: cum priore scripturâ per conditionem tempus demonstratur; sequenti per tempus conditio: utrobique tamen eadem conditio est." It is very true: the word *when*, not so standing by itself, but coupled with other expressions or circumstances, that have a reference to the time at which the possession of the thing is to take place, has been held by the civil law, not to have so absolute a sense that it cannot possibly be controlled. Another passage in the digest (*t*) is thus expressed;—"*Seius Saturninus* Archigubernus ex classe *Britanica* testamento fiduciarum reliquit heredem *Valerium Maximum* trierarchum: à quo petiit ut filio suo *Seio Oceano*, cum ad annos sedecim perveniisset, hereditatem restitueret. *Seius Oceanus*, antequam impleret annos, defunctus est." Then it states that a claim was made by the uncle of *Seius*, as next of kin, which was resisted by the fiduciary heir, who contended, that as *Seius* had not lived to the age of sixteen, it was not vested. The opinion is this: "Si *Seius Oceanus* cui fidei-commissa hereditas ex testamento *Seii Saturnini*, cum annos sedecim haberet, a *Valerio Maximo* fiduciario herede restitui debet, priusquam præfinitum tempus ætatis impleret, decessit: fiduciaria hereditas ad eum pertinet, ad quem cætera bona *Oceani* pertinuerint: quoniam dies fidei-commissi vivo *Oceano* cessit: scilicet si prorogando tempus solutionis, tutelam magis heredi fiduciario permississe, quam incertum diem fidei-commissi, videatur." This distinction was transferred from the civil law to ours; at least so far clearly as regards pecuniary legacies. In the case cited *Stapleton* v. *Cheales*, it was clearly held that the expressions at *twenty-one*, or, *if*, or, *when*, he shall attain twenty-one, were all one and the same; and in each of those cases if the legatee died before that time, the legacy lapsed. I do not find any case in which this position has been ever contradicted. In

(*s*) Lib. 36. tit. 2. sect 22. (*t*) Lib. 36. tit. 1. s. 46.

Fonnereau v. *Fonnereau*, (3 Atk. 645.) (*u*) it was clear, if it had ſtood upon the firſt part of that bequeſt, it would have been held, not veſted. Lord *Hardwicke* reſts entirely upon the ſubſequent words, as controlling the word *when*; as it would have operated, ſtanding alone. That will ſets out preciſely as this does, but when it went on with words making the intention clear, giving intereſt for his education, with a power to the truſtees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him when he ſhould attain the age of 25, it was clear upon the whole, nothing but the payment was poſtponed. A diſtinction has been introduced between the effect of giving a legacy *at* 21, and a legacy *payable* at 21; that is alſo borrowed from the civil law; the code (*x*) thus ſtates it: "Ex his verbis, do, lego Æliæ Severinæ filiæ meæ et ſecundæ decem: quæ legata accipere debebit, cum ad legitimum ſtatum pervenerit: non conditio fidei commiſſo vel legato inſerta; ſed petitio in tempus legitimæ ætatis dilata videtur." For there the words were, that the time of payment was to be at her legitimate age: "Et ideo ſi Ælia Severina filia teſtatoris cui legatum relictum eſt, die legati cedente vita functa eſt: ad heredem ſuum actionem tranſmiſit: ſcilicet ut eo tempore ſolutio fiat, quo Severina, ſi rebus humanis ſubtracta non fuiſſet, viceſſimum quintum annum ætatis impleſſet." This diſtinction, however, has been held by ſome equity judges altogether without foundation, and by others it has been treated as too refined. Lord Keeper *Wright*, in *Yates* v. *Fettiplace* (Pre. Ch. 140) alluding to the diſtinction in *Godolphin* and *Swinburne*, from the civil law, declared it altogether without foundation. Lord *Cowper* acknowledged, that it was at leaſt a refinement: but he thought it was now well eſtabliſhed. Lord *Hardwicke* likewiſe ſaid, it was originally a refinement; but in what did that refinement conſiſt? It was not in holding that it ſhould not veſt before the age of 21, but in holding that it ſhould veſt, though the party ſhould not attain that age: their opinion being, that it ſhould not veſt. Then why ſhould we refine upon a refinement, by deviating ſtill more, and holding arbitrarily that the word *when*, ſtanding by itſelf, does not import a condition? I ſay, that ſtanding by itſelf, does import condition! and it requires other words to ſhew, it was meant to defer payment. But according to the report of the judgment in *May* v. *Wood*, it is quite the reverſe; that ſtanding alone it imports delay of payment, and other words are neceſſary to ſhew a condition. That is a diſtinction upon a diſtinction, which original diſtinction has by ſeveral great judges been held to have been originally a refinement. The only caſes alluded to in

(*u*) *Infra*. (*x*) Lib. 6. tit. 53. ſect. 5.

May v. *Wood*, are cases of real estate; beginning with *Boraston's* case (3 Co. 16.) and ending with *Doe* v. *Lea*. The principle of them all is stated by Lord *Mansfield*, in *Goodtitle* v. *Whitby* (1 Burr. 228), in a way that renders them perfectly consistent with the opinion I entertain as to the word *when*, standing by itself, unqualified and uncontrolled. Lord *Mansfield* there lays down these rules of construction; 1st. Wherever the whole property is devised with a particular interest given out of it, it operates by way of exception out of the absolute property. 2dly. Where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, &c. and when he shall come of age, &c. then to him, &c. the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder-man is to take in possession.—There could be no doubt of the intention there, every thing was given to the trustees for the benefit of the infant. He was intitled ultimately to have the whole. The reason of giving to the trustees in the mean time evidently was, that he was not intended to have the possession and management until the age of 21. Upon exactly the same ground was *Boraston's* case. It was not alledged in that case, that these were not words of contingency taken by themselves; but it was said, you must model these unapt words, so as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpose; as if he had calculated how many years it would take to pay off his debts, and in how many years *H. Boraston* would attain the age of 21; and if given to the executors, with remainder to him at 21; it would be a clear vested remainder. The court approves that argument of the counsel, but does not say that *when*, standing by itself, would not have made a condition. So in *Mansfield* v. *Dugard*, (1 Eq. Ca. Abr. 195) it was clear the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife: but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this, whether, where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say the enjoyment only is to be postponed. So in *Doe* v. *Lea* (3 Term Rep. *K. B.* 41) the devisee was intended to have the whole benefit, but trustees were interposed to keep the management of the estate until he should attain the age of 24, with a charge out of the rents and profits to keep the buildings in repair. There was a reason for postponing the possession; and it was evident, nothing but the enjoyment was intended to be postponed. It was not a bare devise to him *when* he should attain

24. If thoſe caſes, therefore, had occurred as to pecuniary legacies, there is no ground to ſay the deciſion ought to have been different, for from the very ſame circumſtances and expreſſions it might be collected, that the word *when* was uſed, not as a condition, but merely to poſtpone the enjoyment: the poſſeſſion in the mean time being diſpoſed of in another way. It is impoſſible that Lord *Mansfield* (and there is nothing in his judgment indicating it) could have conſidered the word *when*, ſtanding by itſelf, as other than a word of condition. It is impoſſible for only two days before, in *Goſs* v. *Nelſon*, (1 Burr. 226) having occaſion to ſpeak of legacies, upon a note of hand which he compared to the caſe of a legacy, he ſays, 'but if the time is annexed to the ſubſtance of the gift, as a legacy if, or *when* he ſhall attain 21, it will not veſt before that contingency happens.' He conſidered *when*, preciſely the ſame as *if*. *Love* v. *L'Eſtrange* (*y*) ſeems to have been conſidered a ſtrong authority for holding *when*, to operate conditionally. The late Lord *Chancellor* was ſo ſtrongly impreſſed with the idea he had thrown out at an early period in *Monkhouſe* v. *Holme* (*z*), that he found it difficult to account for it otherwiſe than upon the diſtinction as to a reſidue; which the late *Maſter of the Rolls* in *Booth* v. *Booth*, acknowledged there might be. But it was not neceſſary to reſort to that, for *Love* v. *L'Eſtrange* may be warranted upon the principles laid down in *Goodtitle* v. *Whitby*. It was not a ſimple unqualified gift: but there were many circumſtances to ſhew that *W. Naſh* was meant to have the benefit abſolutely, and that the enjoyment only was poſtponed, the teſtator giving it to truſtees in the mean time, and applying a reaſon for withholding the enjoyment from this minor, that he wiſhed him to follow his trade as a journeyman with which object he naturally thought that fortune would interfere, and therefore he poſtpones the enjoyment of it until the age of 24; but he gives it to truſtees entirely and abſolutely for the benefit of *W. Naſh*, to improve it for his benefit; to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the mean time. That is very different from a ſimple bequeſt to him when 24, for if that had been a legacy, it would have been ſeparated from the reſidue immediately upon the teſtator's death, and muſt have been paid over to the truſtees immediately; and they would have managed it until the legatee had attained the age of 24. Upon the whole view of the caſes, and taking the reaſon of the doctrine, and the origin of it into conſideration, there is no ground whatſoever for the generality of the propoſition, which the Maſter of the Rolls is repreſented to have

(*y*) Stated *Infrà*. (*z*) *Infrà*.

laid down in *May* v. *Wood*. To that proposition the following words are added 'and not, where he has merely used the word *when*, for the sole purpose of postponing the time of payment.' If the Master of the Rolls meant so to qualify his former proposition, that I admit, and have no difficulty in agreeing to it. But it is evident, that this is inaccurately taken, for the two parts of the proposition do not accord. First it is laid down generally, that it requires words to shew, *when* does operate conditionally; in the latter part it is stated, that if it appears *when* is used only for postponing payment, it shall operate no farther. Nothing can be clearer than that. In this cause, therefore, I should have determined against the plaintiffs, if it stood merely upon the first words," the plaintiffs were *B.* and *C.* the two surviving legatees who claimed the legacy of *D.* that died unmarried, and under 21.

Admitting, therefore, that a legacy given to a person *when* he shall attain 21, is generally conditional, and will not vest before the arrival of that period, yet the construction may be varied, from a different intention appearing upon the will.

(*a*) *A.* bequeathed to the two children of his niece, one dock-share, &c. *when* they shall attain 21, to be equally divided between them, and appointed their father trustee for them during minority, and willed that in case of the death of either of them the survivor should take the whole, and if both died minors, he gave the dock-share to his niece in fee. The question was, whether the children took a vested interest before 21? And by the *Master of the Rolls*, "there is no doubt upon this point. It is perfectly clear what this testator intended to postpone was not the vesting, but the possession. He appoints a trustee. How could there be a trustee for them of nothing? There are many cases in which, notwithstanding the word *when*, the interest vested. In *Hanson* v. *Graham*, I held that a bequest in these terms may be so controlled by expressions and circumstances, as to postpone the possession only, not the vesting. Of what is the father trustee during their minority? I cannot put any other meaning upon those words. He intended to appoint a trustee for them beneficially. Decree that this dock share be transferred to the father upon the trusts of the will."

It must not be understood that the words, *at*, or, *if*, or, *when*, or *provided*, are indispensably necessary to suspend the vesting of legacies, until the time limited for their payment arrives, for in all cases, when it can be collected from the will, that the direction for payment is blended with the very gift of the legacy, the legacy will not vest before the period for payment of it arrives, as in one among other instances, where the *interest* only is given for life, and there is no gift of the *corpus* or principal to, or in trust for the legatees, until after the expiration of the life-estate, &c.

(*a*) Branstrom *v.* Wilkinson, 7 Ves. Jun. CC. 421.

(*b*) *A.* bequeathed in this manner. "I do further give and bequeath to my brother *C. B. the intereſt of* 1500*l.* during his life, and from and after his deceaſe, I give *the ſaid ſum of* 1500*l.* unto and among all and every the younger ſon and ſons, in caſe there be any younger ſons, and all and every the daughter and daughters of my brother *C. B.* now lawfully begotten, or to be hereafter begotten, ſhare and ſhare alike, but in caſe he ſhall have only daughters lawfully begotten, then only unto and among the younger daughter or daughters, and to be paid to them all every and each of them, at and when they ſhall have obtained to their reſpective ages of one-and-twenty years. But my expreſs will and meaning is, that no elder ſon, in caſe there ſhall be more than one ſon, nor any elder daughter, if there be only daughters of my brother *B. living at his deceaſe*, ſhall have any part, ſhare or intereſt in the 1500*l.* But in caſe all the children of my ſaid brother *C. B.* except one, either ſon or daughter, ſhall happen to die before their reſpective ages of twenty-one, then I give 100*l.* part of the 1500*l.* to ſuch ſurviving only child, whether ſon or daughter, and to be paid to him or her at their age of twenty-one." *C. B.* had three children, a ſon and two daughters, at the date of the will, and one ſon was born after the teſtator's death. *Letitia*, one of the daughters, married and attained twenty-one, but died before her father. The queſtion was, whether *Letitia* having attained twenty-one, but dying in the lifetime of her father, was nevertheleſs entitled under *A.*'s will to a ſhare of the 1500*l.* ſo as to tranſmit it to her huſband, the defendant, her repreſentative? And by lord *Hardwicke*, C. "I am of opinion that ſhe is not entitled. There are ſome obſcure clauſes in the will. The teſtator does not begin with giving the 1500*l* to *C. B.* but the intereſt only; then follows, item, from and after the deceaſe of my brother *C. B.* I give the ſaid ſum of 1500*l.* &c. Now if there had been nothing ſaid of the intereſt before in the will, and the clauſe had begun with, from and after the deceaſe of *C. B.* &c. there could have been no doubt, but the veſting muſt have been after the father's death, for the payment is annexed to the ſubſtance of the legacy which is *Clobery*'s caſe, 2 Ventr. 242. It is plain in this caſe, that nothing is given in the principal ſum of 1500*l.* to the children, till after the death of the father, and that it is not to take place till then in point of veſting, as well as in point of payment. 'And to be paid to them all at and when they ſhall have attained to their reſpective ages of twenty-one years.'—Not intended to make it abſolutely payable at twenty-one, but only to reſtrain the deviſees from receiving it till twenty-one, if

(*b*) Billingſley *v.* Wills, 3 Atk. 219. See alſo Brograve *v.* Winder, 2 Vef. Jun. CC. 634, et *infrà*. Elton *v.* Elton, *infrà*. Van *v.* Clark, *infrà*. Stackpole *v.* Beaumont, *infrà*, cap. ...

they ſurvived the father, and ſhould be infants at the time of his death. It has been contended on the part of the defendants, that this clauſe meant to give it to any ſons or daughters who ſhould attain the age of twenty-one at any time. It is manifeſt to me that this relates to younger ſons and younger daughters who ſhall be living after the deceaſe of the father *C. B.* for at the time of the teſtator making his will, *C. B.* had only one ſon and two daughters, the teſtator conſidered no doubt, both the daughters as younger children, whether in fact ſo or not: for this court too conſiders them as ſuch, though in point of age the daughters are older than the ſons. The words "but in caſe he ſhould have only daughters," cannot poſſibly refer to the time of making the will, for the brother had a ſon as well as daughters living at that time, they therefore muſt refer to ſome furure time, that if he ſhould *hereafter* have only daughters, 'then to the younger daughter or daughters, &c.' The queſtion is, what will be that future time? It muſt naturally be the time the teſtator mentions at the beginning of his will, the death of *C. B.* The words, 'when they ſhall have attained their reſpective age of twenty-one years,' are not pretended to relate to the time of veſting, becauſe the father was to enjoy the intereſt of the 1500l. during his life. 'But my expreſs will and meaning is, that no elder ſon ſhall have any part, ſhare or intereſt in the 1500l.' What is the effect of theſe words? Why, plainly to deſcribe further the perſons who were to take the benefit of this legacy. 'Nor any elder daughter, if there be only daughters of my brother *C. B.* living at his deceaſe, ſhall have any ſhare, &c. in the 1500l.' What do the words *living at his deceaſe* refer to? Undoubtedly to both members of the ſentence, and is a further deſcription, videlicet, that ſhould there be ſuch ſons, or ſuch daughters, be they one or the other, who ſhould be living at the time of *C. B.* the father's deceaſe. Theſe words are not only deſcriptive of the child excluded, but likewiſe of the children who are to take. All the ſons and daughters living at the time of his deceaſe, falling in with the intention of the teſtator, upon the preceding part of the bequeſt, *the veſting at the time of his brother's deceaſe.* It has been ſaid, this muſt be conſidered as veſting at the death of the teſtator, in thoſe children who were born before the teſtator's death, and the child born afterwards, but diveſting again, when either of them die before the age of twenty-one; there is no pretence for this, nor will the words admit of ſuch a conſtruction. It has been ſaid too, that the moſt liberal conſtruction ought to be made in the caſe of portions. I do agree in thoſe caſes, where a father is making a proviſion for children, which is called a debt of nature, the court will ſtrain in their favour; but that is not the preſent caſe, for it is the bequeſt of a collateral relation, and is a mere bounty

only. Upon the latter clauſe, 'but in caſe all the children of my ſaid brother *C. B.* &c.' It has been ſaid, that as this is not reſtrained to his ſurviving the father, it ought to affect the conſtruction of the other parts of the will. But as this is a contingency which has not happened, for there are two ſons and a daughter living, I ſhall not extend it ſo far as to affect any other preceding clauſe. And if the firſt words are to have the conſtruction I have already mentioned, even if that one child had died before his age of twenty-one, he could not have been entitled. Upon the whole I am of opinion, that all the ſubſequent words, muſt relate to the preceding; 'from and after the deceaſe' of the teſtator's brother *C. B.*"

(*c*) *B.* deviſed his reſiduary eſtate to his executors in truſt to place out at intereſt, and then proceeded thus. "And I will that the intereſt money and the rents of my houſes, lands or tenements, which my executors ſhall receive, be likewiſe placed out at intereſt, except only if it happen that my daughter ſurvive her huſband, for then my will is that my ſaid truſtees pay to her every year during her life, all the intereſt of the reſidue and remainder of my eſtate and of the increaſe thereof, by intereſt, rents, or otherwiſe; and that after her deceaſe they divide equally among her iſſue all the ſaid reſt and remainder of my eſtate, and the increaſe thereof, but that diviſion to be only when the youngeſt of them ſhall be twenty-one years old; and if any of them be then dead and hath left a lawful iſſue, then my will is that the guardian of that lawful iſſue may receive its ſhare. But if my daughter happen to die without any child, or the youngeſt of them ſhould not arrive at twenty-one years, and none of them ſhall have left lawful iſſue, then my will is, that the remainder of my eſtate and the increaſe thereof be divided into four equal parts, whereof I give, &c." At the date of the will and at the teſtator's death, his daughter *M. A. E.* had iſſue by *L.* her huſband, a daughter about ſix years old, named *A. M.* to whom the teſtator was godfather, and who afterwards intermarried with *C.* and after attaining twenty-one, died in the lifetime of *L.* leaving four children who died infants, all of whom with their mother *A. M.* died before *M. A. E.* but *J.* the laſt ſurviving child did not die till after the death of *L.* the huſband of *M. A. E.* *M. A. E.* having ſurvived her huſband, became entitled to the intereſt of the reſidue, &c. for life; and after her death, the queſtion was, whether the repreſentative of *J.* who alſo repreſented *A. M.* was entitled to the reſidue, or the donees in the will who claimed it as *M. A. E.* left no child living at her death? And lord *Bathurſt*, C. decreed, that according to the true conſtruction of the will, the deviſe over had taken effect, and he ordered the property to be divided among the donees accordingly; but

(*c*) Liege *v.* Thickneſſe, 1 Bro. Parl. Ca. 223.

this decree being unsatisfactory to the representative of *J.* and *A. M.* he appealed to the House of Lords, insisting that the residue vested absolutely in *A. M.* upon her arrival at twenty-one, subject to her mother's right to receive the produce for life. But it was urged by the respondents in support of the decree, with whom the opinion of the lords coincided, "that it appeared to be the manifest intention of the testator to be collected from the whole tenor of his will, that all the limitations of the beneficial interest in the residue of his estate should be *contingent*, and that no person should take any transmissible share of it, before his or her right of enjoyment in possession took place. He meant first to provide for his daughter upon the contingency of her surviving her husband, and afterwards for *such of her issue as should be living at her death*, and if there should be none, then for such of his relations as were named in his will, or their issue as should be then living. He did not in any of the clauses in his will, make use of the words executors or administrators, or any other words which denoted a legal representation, or a transmission of a vested legacy; but always used words of substitution, introducing the issue in the place of the deceased parent, and one donee or set of donees in the room of another; and the intention was not contrary to the rule of law, as the legacy must vest on the death of a person then in being. That the words 'if my daughter happen to die without any child,' which introduced the bequest over, could not mean if she happened to die *without ever having had* any child, for that event he knew could not take place, she having a child living at the time he made his will, and it would be absurd to suppose, that the testator intended to devise over his estate upon a contingency which he knew could not happen. The words must therefore mean if my daughter die *without any child living at her death.*' If the residue of the testator's estate immediately vested in the child of *M. A. E.* then born, subject to her life-interest, it would make the gift over to the several donees nugatory in its creation, but that he meant *such* issue of a deceased child of his daughter should take as should be living at her death, appeared by his directing that the *guardian* of such issue, if under age, should receive its share. If any thing vested in *A. M.* it must have vested in her immediately upon her father's death as a remainder expectant upon her mother's death; but at the time when *A. M.* died, her father being then alive, nothing had vested in her mother, and consequently nothing could have vested in her daughter, it being absurd to say that the remainder vested before the particular estate. And if *A. M.* or any other child of *M. A. E.* had taken a vested interest, it would have been transmissible to their personal representatives if they died before her, and would

not have gone to their iſſue, which would have been plainly contrary to the teſtator's intention. That in the preſent caſe there was no *ſubſtantive* gift to make it a legacy *immediately veſted*, though payable at a future time, but the gift and the time of payment were after the death of *M. A. E.*; both commenced together, and the time of the gift, and of the payment or diviſion, were the ſame. Laſtly, that the bequeſt being to all the children and all the iſſue of any deceaſed children of *M. A. E.* the *quantum* of the legacy of each child or grandchild's ſhare could not be aſcertained until the death of *M. A. E.* and therefore could not be a proper object of, or any conſideration for a ſettlement; nor was it given by the will as a *fortune* or *proviſion*, but only as a *general* legacy, conſequently not within the reaſon of thoſe caſes in which portions or fortunes provided by ſettlements have been held to be veſted and tranſmiſſible intereſts, before the time of raiſing them." And the decree was affirmed.

(*d*) *C.* bequeathed to *R. E.* the *dividends* which ſhould become due after her deceaſe upon 500l. three-per-cent bank annuities, *until* he ſhould arrive at the full age of thirty-two years, *at which time* ſhe directed her executors to transfer to him the principal ſum of 500l. of her three per cent. annuities, for his own uſe. *R. E.* died under the age of thirty-two, and the queſtion was, whether his perſonal repreſentatives, or the reſiduary legatee of the teſtatrix were entitled to the legacy, which depended upon this, whether *R. E.* took a veſted intereſt in it before thirty-two? It was inſiſted for the reſiduary legatee, that there was no gift of the principal to *R. E.* but in the direction to transfer at a time which never arrived, and that the difference was between a gift of the *corpus*, taking it out of the reſidue, and a gift of the dividends only, the fund being to be taken out at a future period; and by the lord *Chancellor*, "I have read over the will, and have looked into the caſes, and am confirmed in my opinion. Upon the caſes it apears, that *dividends* are always a diſtinct ſubject of legacy. In this caſe, there is no gift but in the direction for payment; and the direction for payment attaches only upon a perſon of the age of thirty-two. Therefore he does not fall within the deſcription. In all the other caſes, the thing is given, and the profit of the thing is given." The decree was in favour of the reſiduary legatee.

(*e*) *E.* bequeathed to his wife *B.* the *intereſt* and dividends of 5000l. four per cent. bank annuities for life, *which* 5000l. he directed ſhould be continued in the ſame ſtock, and then be

(*d*) Batsford *v.* Kebbell, 3 Veſ. Jun. CC. 363. (*e*) Reeves *v.* Brymer, 4 Veſ. Jun. CC. 692.

ſhared equally among his children *then living*. He alſo gave his wife a leaſehold houſe and premiſes in his poſſeſſion in the pariſh of, &c. for life, and then to be let to the beſt advantage during the time of the leaſe to come, and the net produce thereof to be equally placed in the ſtocks for the benefit of his children that ſhould be *then living*, equally. Upon a queſtion whether the bequeſts to the children of *B.* were veſted at the teſtator's death, or were contingent during *B*'s life, it was determined, that according to the true conſtruction of the will, the legacies were contingent during *B.*'s exiſtence. The words *then living*, being grammatically applicable to *B.*'s death, and not to that of the teſtator.

There is a caſe indeed of very high authority (being determined upon an appeal to the Houſe of Lords) which has been conſidered difficult to be reconciled with the principle of the caſes relating to the non-veſting of legacies before the time appointed for their payment, when the gift and the direction of payment were the ſame. The caſe alluded to was in ſubſtance as follows:—

(*f*) *A.* bequeathed to truſtees who were his executors his reſiduary eſtate, and then proceeded, "in truſt to ſell, diſpoſe, and improve to the beſt advantage, as in the judgments and diſcretion of them and the ſurvivor of them, and the executors and adminiſtrators of ſuch ſurvivor, whereunto for gain or loſs the ſame is hereby wholly referred, *until W. N. of, &c. ſhall attain his age of twenty-four years:* It being my deſire, that he ſhall be employed wholly in his trade, either as an apprentice according to his preſent indentures, or as a journeyman until his ſaid age, upon truſt in my ſaid loving friends repoſed, and from the age of twenty-one years of the ſaid *W. N.* out of the ſaid reſidue to pay him an annuity of 10l. yearly until his age of twenty-four years, and from thenceforth in truſt for him the ſaid *W. N.* his executors, adminiſtrators and aſſigns, and the accounts of the ſaid reſidue to be given by my ſaid truſtees, to be binding and concluſive to him, without exception, or any queſtion at all to be made by him or them therefore." *W. N.* attained twenty-one, but died before twenty-four, inteſtate and unmarried. The next of kin of the teſtator commenced a ſuit for the reſidue, inſiſting that as *W. N.* died under the age of twenty-four, the reſidue did not veſt in him, but belonged to them. On the contrary, the next of kin of *W. N.* inſiſted on the reverſe, in whoſe favour lord *King*, C. pronounced a decree, and from which the teſtator's next of kin appealed, alledging, that by the teſtator's will it appeared he never intended that *W. N.* ſhould be entitled to any advantage by the

(*f*) Love *v.* L'Eſtrange, 3 Bro. Parl. Ca. 337.

bequest of the residue, except to the provision of 10l. a-year until his age of twenty-four, and that the right of property in such residue was not to vest in him until that time. And as *W. N.* died before he attained that age and before any title to the residuary estate vested in him, the benefit of the devise could not belong to his representatives, but ought to be considered as a lapsed legacy, and undisposed of by the will, and consequently belonged to the appellants as the testator's next of kin, and as not being given from them by his will. On the other side it was contended, that the bequest of the residue of the testator's personal estate, was absolute and unconditional, and the trust being declared for *W. N.* in the manner mentioned in the will, the equitable right to such residue vested in him immediately upon the testator's death. And though he died before he attained twenty-four, such right was transmissible to his proper representatives, the age of twenty-four being mentioned, not to prevent the right from vesting in *W. N.* before that age, but to direct the trustees as to the time of paying it to him. That there was no material difference between a money legacy given to one absolutely out of personal estate, to be paid at a future day, (where it has always been held that such a legacy became vested, and would belong to the proper representative of the legatee, although such legatee should die before the day of payment), and the present bequest of the residue to the executors upon the trust before mentioned; and therefore it was hoped, that as the decree was just, and according to the rules of equity, it would be affirmed, and the appeal dismissed. The decree was accordingly affirmed.

In (*g*) *Monkhouse* v. *Holme*, lord *Loughborough* expressed his inability to account for the principle of the decision in the last case, unless it were to be referred to its being a *residue*, as the words were clearly annexed to the gift, his lordship observing that a different determination might have been expected, if it had been the case of a *general* legacy. But Sir *William Grant*, *Master of the Rolls*, in *Hanson* v. *Graham* (*h*), thought it was unnecessary to resort to the gift being a residue, to account for the judgment, as it might be supported by the circumstances of the case.

A distinction must be made, even when the gift of the legacy, and the time of payment are distinct, between the cases where the period of payment is certain, as when the legatee shall attain twenty-one, and those when such period is coupled with a contingency, as *upon the marriage* or *taking holy orders*, &c. of the legatee (*i*). In the latter cases, the legacy will

(*g*) 1 Bro. CC. 300. (*h*) Vide, opinion fully stated *supra*, p. 161, also Booth *v.* Booth, *infra*. (*i*) Swinb. part 4. sect. 17. p. 267. 299.

not vest before the contingent event takes place. The distinction is founded in this reason. In the former cases it is inferred, that by postponing payment of the legacy until the arrival of the legatee at twenty-one, the testator did so in consideration only of the legatee's unfitness to manage his affairs prior to that period. But in the latter, the occasion upon which the legacy is directed to be paid, is presumed to have been the *motive*, and therefore *of the very essence* of the bequest.

(*k*) *A.* bequeathed in these words, "I devise to my daughter *E. H.* the sum of 200l. to be paid to her at the time of her marriage, or within three months after, provided she marry with the approbation of my two sons *W.* and *S.* or the survivor of them, and my will is that my said daughter shall yearly receive and be paid until such time as she shall marry, the sum of 12l. free and clear of all taxes and impositions whatsoever," which 200l. and 12l. were charged upon a leasehold estate given to his two sons. *E. H.* having attained twenty-one died unmarried, and the question was, whether *E. H.* took such a vested interest in the legacy as was transmissible to her administrator? Lord *Hardwicke*, C. "I am of opinion this was not a vested legacy; in the common cases of legacies to be paid at the age of twenty-one, there is a certain time fixed, not to the thing itself, but to the execution of it, and the time being so fixed, must necessarily come; but when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court, where it has been held, that the legacy at all events should be paid. The rule as to the vesting is founded upon another rule, *certum est quod certum reddi potest*, and it is plain that the testator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition be satisfied. It has been argued by the Attorney-General, that this bequest does not differ from a legacy given *to be paid at twenty-one*, which vests immediately, and the time of payment only is postponed. But it has always been held, with regard to such a limitation of payment at twenty-one, that it is *debitum in presenti, solvendum in futuro*, and the payment postponed merely on account of the legatee's legal incapacity of managing his own affairs, till that age, and this has been the established rule of this court ever since *Clobery's* case, 2 Ventris 342. In the *Digest*, lib. 35. tit. 1. lex 75. *de conditionibus*, &c. it is held that *dies incertus*, *conditionem in testamento facit*, and these are the words of the text and not of the commentator, so that a time abso-

(*k*) Atkins v. Hiccocks, 1 Atk. 500.

lutely uncertain is put on the ſame footing as a condition; but as the civil law is no further of authority than as it has been received in *England*, let us ſee what our own authors ſay. *Swinburn*, pt. 4. ſect. 17. p. 267. *old edition*, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee dies before, the legacy is loſt. *God. Orp. Leg.* 452. is to the ſame effect. It has been inſiſted that the teſtator giving 12l. *per annum.* to *E. H.* till the contingency of her marriage, is in the nature of intereſt for the 200l. and that from thence it appears to be his intention, that the legacy ſhould veſt in the mean time. But whenever this doctrine has been allowed, the payment of the principal has been certain, and ſo not ſimilar to the preſent caſe, becauſe here this is not meant as intereſt, for it is an annuity of 12l. charged upon and iſſuing out of an eſtate. The ſecond point is very ſtrong againſt the tranſmiſſibleneſs, which is her marrying with the conſent of her two brothers, and ſhews plainly the teſtator intended a condition precedent, that if ſhe married ſhe was to have 200l. for her portion, but if ſhe died before, there was no occaſion to have it raiſed for the benefit of a ſtranger. It is true indeed as there is no deviſe over, the clauſe of conſent might be only *in terrorem*, but in all caſes where the condition of marrying is annexed, it is neceſſary that the condition, as to the marrying at leaſt, ſhould be performed, though ſhe is not obliged to marry with conſent. I am the more ſatisfied, becauſe it appears to be the intention of the teſtator that this 200l. ſhould be in the nature of a marriage portion, for he has taken it out of a leaſehold eſtate, and if ſhe did not marry, it was manifeſtly his deſign that it ſhould ſink in that eſtate for the benefit of his ſons: therefore I think this bequeſt is to be conſidered as a condition precedent, which not being performed, the legacy never veſted, and conſequently the adminiſtrator can make no title to it."

(*l*) *B.* bequeathed in this manner. "I give and bequeath the ſum of 1500l. unto my grand-daughter *A. E.* the daughter of my ſon *J. E.* to be at her diſpoſal, purſuant to the requeſt of my ſaid late deceaſed daughter *E. D.* in caſe ſhe marry with the conſent and approbation of my ſaid ſon *J. E.* and his wife, and in caſe of their deaths before that time, then with the conſent and approbation of their truſtees, and not otherwiſe." *A. E.* died at the age of fourteen and unmarried, and the queſtion was, whether the legacy veſted in *A. E.* and her repreſentative was entitled to it? And by lord *Hardwicke*, C. "The general queſtion is, whether it was a veſted legacy in *A. E.*

(*l*) Elton *v.* Elton, 3 Atk. 504.

at the time of her death? and that will depend upon the conſtruction of the will, and the authorities of this court. As to the clauſe in a former part of the will in which the teſtator gave 1000l. to *A. E.* at twenty-one or marriage, which ſhould firſt happen, I ſhall conſider it afterwards. It has been inſiſted for the plaintiff (her repreſentative) that the legacy veſted in *A. E.* immediately upon the death of the teſtator, and therefore, notwithſtanding ſhe is dead unmarried, that he, as her repreſentative is intitled to it, and that the whole of this is a condition ſubſequent, and her dying before marriage, being the act of God, does not defeat the legacy. But I deny this abſolutely, and hold it to be a condition precedent, though whether a condition precedent or ſubſequent, it makes no difference, but that this is a condition precedent, appears from the words, for whether a teſtator ſays, in caſe ſhe marries I give, or I give in caſe ſhe marries, it makes no difference, but in both caſes, it is annexed to the *ſubſtance* of the deviſe. The words, *to be at her diſpoſal*, do not vary the caſe, for whoever gives a legacy, gives it to be at the diſpoſal of the legatee, and thoſe words cannot be ſeparated from the words, *I give*; it is plain, therefore, upon the words, that it is a condition precedent, and dependent upon the marriage. Suppoſe this young lady had immediately on the death of her grandfather, brought a bill for the legacy, the court could not have decreed it, for *the time is annexed to the ſubſtance of the legacy*, and therefore is ſtronger than the caſe of *Atkins* v. *Hiccocks* (*m*), which was annexed to the payment only, and is called by the civil law, *execution of the legacy*, and in this reſpect I govern myſelf a good deal by the caſe of *Garbut* v. *Hilton*, at the Rolls (1 Atk. 381). It has been ſaid by the attorney general, it is very improbable that the grandfather would make ſuch a diſpoſition as might keep it poſſibly in ſuſpenſe during the whole life of the grand-daughter. Could ſhe have had the intereſt if ſhe had brought her bill? Certainly ſhe could not, for where intereſt is not given by a grandfather ſhe is not intitled to it; *contra* where a legacy is given by a father, becauſe if he do not provide maintenance, the court will give intereſt in lieu of it, though the legacy be payable at a future day. The civil law does not make any difference whether the condition is precedent or ſubſequent, for there any reſtraint of marriage is void, but then this court and the civil law do both require the *factum* of the marriage ſhould be performed. Whether it is taken in the ſenſe of a condition, or in the ſenſe and meaning of a time of payment, it is the ſame thing, for the rule is *dies incertus in teſtamento conditionem facit*. When it is given to be

(*m*) *Supra*.

paid at 21, the time is certain, and known to an hour, and therefore held to be tranſmiſſible, but where the time is *uncertain*, it has been held not to veſt, till the contingency happens, *becauſe it cannot be aſcertained, whether it will ever happen or not.* I do agree that there is an ambiguity in the words, *not otherwiſe*, whether they relate to the words immediately antecedent, or to the whole clauſe. It has been contended for the plaintiff, that they relate only to the words immediately antecedent, but I do not know, what warrant there is to confine theſe words, only to a part of the ſentence, but they muſt run through the whole, and mean, that he does not give it unleſs there ſhould be a marriage. In the caſe of *Atkins* v. *Hiccocks*, I determined upon the ſame foundation, and the ſame principles I go upon in the preſent, though as I ſaid before, that is a ſtronger caſe, for there in the gift of the legacy, the time was not annexed to the ſubſtance of the legacy, but to the payment only, and yet the ground of my determination was, that the veſting of the legacy, related to the event of the marriage, and as that never happened, the legacy did not veſt. There it was a legacy given by the father as a portion, but in the caſe of a grand-father, he is not bound by that duty of nature to provide for a grand-child, eſpecially in this caſe, where a father was living at the time of the will, and after the teſtator's death. In the caſe of a deviſe by a grand-father to a grand-child of a copy-hold eſtate, where there is no ſurrender, the court will not ſupply it againſt an heir at law, and it was ſo held in *Kettle* v. *Townſend*, 1 Salk. 187. I am of opinion from the whole texture of this will, that the legal conſtruction agrees with the intention of the teſtator. The will ſpeaks that the grand-father meant this legacy as an addition to her fortune *in caſe ſhe married*, for in a former clauſe of the will he had given her another legacy of 1000l. either at 21 or marriage, which ſhould firſt happen, ſo that if ſhe had lived to be 21, and had died unmarried, yet ſhe would have been intitled to ſomething. It might have been a queſtion, whether the words *to be at her own diſpoſal*, were not giving it to her ſeparate uſe, but if they were not, it would have made no difference, becauſe her relations might before the marriage have ſecured it for her ſeparate uſe. The caſe of *Atkins* v. *Hiccocks* is in point, and whether right or no, has not been appealed from; and I ſhall not be inclined to deviate from my own opinion, which was given upon mature conſideration." Decree againſt the repreſentative of the legatee.

It is to be noticed however, that a diſtinction has been made in relation to this ſubject, between a *particular* or *general* legacy, and the bequeſt of a *reſidue*. It has been juſt obſerved,

that the uncertain event upon which the former was given must take place, before the interest will vest, but since an intestacy would be created by a similar decision in cases of *residuary* bequests, the court has struggled against making such determinations, and inclined in favour of vested interests, though not in such manner as to intitle the legatee to his legacy, before the event happened upon which it was given, but to intitle his representative or devisee to call for it immediately upon his death. Thus;—

(*n*) *A.* devised his real estate to his great nephew, *R. B.* and his issue in strict settlement with remainder to his brother *S. B.* and his issue in strict settlement, with similar remainders to their sisters, *P. B.* and *A. B.* and their issue respectively. And after giving a legacy to his great nephew *R. B.* and another to *R. L.* whom he appointed sole executor, he bequeathed the *residue* of his estate and effects to *R. L.* and *J. C.* upon trust with all convenient dispatch after his death to invest upon government or real securities in their joint names, or in the name of the survivor, and to pay the dividends and produce equally between his great-nieces *P. B.* and *A. B.* until their respective marriages, and immediately after their respective marriages, to assign and transfer their respective moieties or shares thereof unto them respectively. At the date of the will both the nieces were of age, and after the testator's death *P. B.* having died unmarried, the question was whether she took a vested interest in a moiety of the residue, though never having been married, which was transmissible to her sister and *S. B.* her executors, or whether it was contingent while she remained single, and therefore now the property of the sister jointly with her two brothers, (who were the next of kin of the testator *A.*) as undisposed of? And by Sir *Richard Pepper Arden*, M. R. "This case deserved very great consideration, least it should be supposed, that the court had by deciding it, transgressed the rule laid down, as to legacies given payable at an uncertain time. When it was argued, I was impressed with an idea, that it was distinguishable from all the cases in respect of its not being the case of a legacy, but of a *residue*, and all the cases in which that rule prevailed, were cases of mere legacies, to be paid out of the personal estate by the executor; the residuary legatee or the executor, if he was to have the residue, having only to pay at the time the legacy became due, and taking the residue. But this is not that case, but the case of a residue. I do not see that any of the pecuniary legacies are given to *P. B.* and *A. B.* though I do not think that would make much difference. They are both com-

(*n*) Booth *v.* Booth, 4 Ves. Jun. CC. 399.

prehended in the limitations of the real eſtate. It is to be obſerved that *R. L.* only is executor: *J. C.* is a truſtee, but not executor. Therefore it is not a gift of the reſidue to the executor, but to him and another perſon upon theſe truſts. Both theſe reſiduary legatees were adults at the time the reſidue was given to them, if it had been otherwiſe, it might have made ſome ingredient in the argument. The event that has happened, is that one of them has died without having ever been married, and the bill is filed by her ſiſter, claiming under her will, and inſiſting that ſhe was intitled, though ſhe never married, that marriage was not a condition precedent upon which the reſidue was to veſt, but merely denoted the time, at which the reſiduary legatees were to be put in full poſſeſſion of the property. The argument upon the part of the plaintiff turned upon a ground that is frequently taken upon legacies payable at a future day, which on account of the death of the legatee never arrives; that the time being mentioned merely as the time of payment, on account of the ſituation and circumſtances of the party is never held to defeat the legacy. The caſes were commented upon on both ſides. *Atkinſon* v. *Paice* (1 Bro. CC. 91,) which I lay out of the caſe. It does not prove much. Of the other caſes, *Boraſton*'s caſe, (3 Co. 19,) *Doe* v. *Lea.* (3 Term. Rep. B. R. 41,) *Goodtitle* v. *Whitby*, (3 Burr. 234.) and *Manſfield* v. *Dugard*, 1 Eq. Ca. Abr. 195, are in favour of the plaintiff: but it was properly obſerved, they were all caſes of an abſolute intereſt; the poſſeſſion of which was to be given at a certain time. The reaſoning upon them would be ſufficient for the plaintiff, if applied to this caſe; for the reaſoning is, that though the teſtator has given a partial intereſt till that time, theſe words of reference as to the time are not to be conſidered as referring to the time upon which only the deviſe is to take place, but the time at which the deviſee or legatee is to be intitled to the full and abſolute benefit of the bequeſt; and a reaſon is given, which does not apply to this caſe, that it cannot be ſuppoſed that if the deviſee or legatee ſhould die before that time, leaving children, the intention was that the children ſhould not take. I ſhall not comment upon the caſes. The arguments of the judges who decided them, are very full to ſhew, that ſuch words do not make a condition precedent, but merely denote the time of abſolute poſſeſſion. It is very true, that the caſes relied on by the defendant *Garbut* v. *Hilton*, *Atkins* v. *Hiccocks*, and *Elton* v. *Elton*, are very diſtinguiſhable from this. Firſt, they are all caſes of mere legacy, not of a reſidue: Secondly in the very gift of the legacy it is perfectly clear, as Lord *Hardwicke* obſerved in *Elton* v. *Elton*, that they are all caſes of a condition

absolutely precedent. It is impossible not to see, that the testator meant the legatee to bring himself into the circumstances specified. In all those cases the legacy was given upon a marriage with a given consent. It is impossible in that sort of case to say, the legatee could be intitled without that. It would be to put a violation upon the very words of the bequest. Therefore the plaintiff's counsel are fully justified in saying that those cases cannot be brought to bear upon this question. They are cases of legacies and conditions precedent. They were considered and determined as such. For the defendant, besides the cases I have mentioned, the late case of *Batsford* v. *Kebbell* (*o*) was relied on, in which the *Lord Chancellor* took a great distinction between a bequest of a sum of money payable at a future time, and a gift of the interest until a certain time, and then a gift of the principal. His Lordship gave a short judgment, but upon consideration of all the cases, he laid it down that it is necessary to shew, the principal was intended to be given, before the time arrived, and in that case he for that reason held the legacy (for that was the case of a legacy) never attached. It is to be considered whether this case is in its circumstances distinguishable from all these cases; and I am of opinion that it is. It is distinguished from *Batsford* v. *Kebbell* in this respect, that this is in fact, an absolute gift of the residue to trustees. It may be said, that so much of the trust as is not sufficiently declared must go to the person who would be entitled, in case there was no disposition, but I think it is equivalent to saying, in trust for them, to pay and dispose of the dividends and interest to them, till their respective marriages, and then to assign and transfer the principal; for *it is not merely a gift of the interest until marriage*, stopping there, and after the marriage a gift of the principal. But it is impossible not to see, that these words are equivalent to a gift of the principal. The testator considers it as given, he speaks of it as their shares of the residue. The day of their marriage is the time, at which they are to be put into actual possession of their shares. I cannot construe this otherwise, than an absolute gift of the residue, qualified only thus, that until their marriages, until when, I suppose, he thought they would not want it, they were not to have the actual possession. That there is a difference between a bequest of a legacy and a residue, with reference to this point, cannot be denied either upon principle or precedent. Every intendment is to be made, against holding a man to die intestate, who sits down to dispose of the residue of his property. How did this testator dispose of it? It might be supposed natural, that they would

(*o*) *Supra.*

marry. It might be in his idea, that there might be a poſſibility, that they might not marry. If he did not mean by the reſiduary bequeſt to diſpoſe of the abſolute intereſt, it was natural that he ſhould declare what ſhould be the caſe, if they ſhould not marry. He has not done that. So much as to the principle. Next, how far in point of precedent has a gift of the reſidue been held diſtinguiſhed from a mere legacy. In *Monkhouſe* v. *Holme*, Lord *Loughborough* comments upon all the caſes, and among others mentions *Love* v. *L'Eſtrange*, upon which I mainly rely in this caſe. His Lordſhip ſaid, that caſe was determined upon the ground of its being a reſidue; and if the report be correct, he gave a decided opinion, that *Love* v. *L'Eſtrange*, if it had not been the caſe of a reſidue, would not have been decided as it was, he being of opinion that if it had not been the caſe of a reſidue, but a legacy, it would not have been a veſted intereſt. I am not now commenting upon the point, whether the argument ſtrictly applies to *Love* v. *L'Eſtrange*. It is enough for me to avail myſelf of Lord *Loughborough*'s comment upon it; who was evidently of that opinion upon the ground, upon which *Batsford* v. *Kebbell* was decided. In *Monkhouſe* v. *Holme*, Lord *Loughborough* ſeems to be of opinion as he was in *Batsford* v. *Kebbell*, that in *Love* v. *L'Eſtrange*, there being no gift of the principal until the age of 24, and only a partial gift in the mean time, from the age of 21, not ſo much as the intereſt, the principal could not attach until that time, unleſs upon its being the caſe of a reſidue, which diſtinguiſhed it from *Batsford* v. *Kebbell*, a caſe in other reſpects very like it. I do not find, that it is principally inſiſted upon in the printed caſe of *Love* v. *L'Eſtrange*; and I ſee in *May* v. *Wood*, (*p*), that I ſtated that fact, and that I did not ſee any difference between the caſes of a legacy and a reſidue. If I did ſay ſo, I ſpoke with too much latitude; for I then thought, and I now think there is a diſtinction, though in that caſe it made no difference; the words being ſo like thoſe in *Doe* v. *Lea*, and *Goodtitle* v. *Whitby*, in the latter of which ſome principles are laid down by Lord *Mansfield*, with regard to all words that may be conſtrued words of reference to the time at which poſſeſſion is to be given, and not words of condition that ſeem to me to govern the deciſion of this caſe. The firſt principle laid down by Lord *Mansfield* is, that wherever the whole property is deviſed with a particular intereſt given out of it, it operates by way of exception out of the abſolute property. In that caſe the eſtates were given to truſtees and their heirs upon truſt to apply the rents and profits for the

(*p*) *Supra*.

maintenance and education of the nephews of the deviſor, during their minorities, and when and as they ſhould reſpectively attain the age of 21, then to the uſe of his ſaid nephews. Another principle laid down by Lord *Mansfield* is, that where an abſolute property is given, and a particular intereſt given in the mean time, as until the deviſee ſhall come of age, &c. and when he ſhall come of age, &c. then to him, &c. the rule is, that ſhall not operate as a condition precedent, but as a deſcription of the time, when the remainder-man is to take in poſſeſſion. If this will had mentioned a particular age inſtead of marriage, there could be no doubt, that theſe caſes would have abſolutely governed it, for though I do not deny, that *dies incertus in teſtamento conditionem facit*, I ſay, admitting that principle, that marriage is the time at which they were to be put in poſſeſſion. It is true, the teſtator fixes the marriage to the time at which they were to be put in poſſeſſion. It is not a marriage under any qualification, but whenever they ſhould marry. Where is the abſurdity, that that time ſhould be fixed as the time for their being put into poſſeſſion? The teſtator thought that to be the time at which they might want it, and until which it would be better applied upon that truſt for their benefit. Therefore without breaking in upon that rule of the civil law, or the caſes before Lord *Hardwicke*, to whoſe doctrine I wiſh to refer, that it is impoſſible not to ſee, that the teſtator in thoſe caſes, did mean theſe circumſtances to be conditional, I am of opinion, there is nothing in this will to ſhew a condition precedent to the veſting of this intereſt. Another reaſon may be given. Suppoſe one of theſe ſiſters had married, and had children: this interpretation puts it in the power of the other to provide for thoſe children. It has been determined that where a legacy is given, payable at the age of 24, the legatee at the age of 21, may diſpoſe of it by will. The ſame reaſon applies to this caſe. Upon theſe circumſtances and *the ground that this is a reſidue*, and upon the words of the bequeſt in this caſe, I am of opinion that the plaintiff is intitled under the will of her ſiſter to her ſhare of the reſidue." But though the court decreed to the ſurviving ſiſter, the ſhare of the deceaſed ſiſter, yet it would not order payment, to her of her own moiety, as ſhe might marry, at which time it would be payable; his Honour obſerving, that the court had never accelerated the payment; that an intereſt might be veſted and diſpoſable, but not tangible in the mean time, and that it might be a wiſe proviſion intended for the benefit of the legatee.

In caſes where there is no gift of the legacy, prior to the time appointed for payment, ſo as to veſt it in intereſt before that period, yet if the teſtator has given the *intermediate intereſt*

to the legatee, or directed it to be applied for his benefit, this circumſtance will have the effect to veſt ſuch legacy, and for this reaſon, as no intereſt could accrue to the legatee previouſly to the time appointed for payment of the principal, the teſtator's intention by giving intereſt muſt be preſumed to have been, to give ſuch principal in all events to the legatee, and to have allowed him intermediate intereſt as a recompenſe for forbearance of the capital (*q*).

(*r*) *A.* bequeathed to *C. F.* when he ſhould have attained the age of 25, the ſum of 1000l. which he empowered his four ſons, his executors, guardians and truſtees of the will, to lay out upon ſuch ſecurities as they ſhould think fit, the intereſt or income whereof was to be for or towards the maintenance and education of *C. F.* as they ſhould think fit, as alſo part of the principal to put him apprentice, and the remainder to be paid him when he ſhould have attained his age of 25, and not before. *C. F.* having ſurvived the teſtator, died at the age of nineteen, and the queſtion was, whether the legacy was an intereſt ſo veſted in him as to be tranſmiſſible to his father who was his repreſentative? And by Lord *Hardwicke*, C. "The queſtion is whether the time of 25 years is put in, in order to poſtpone the veſting of the legacy? or only to poſtpone the payment of it? I am opinion it is only to poſtpone the payment. It is true there is a diſtinction where a legacy is given to one *at* his age of 21, there it is not veſted, but where it is to him *to be paid* at 21, it is veſted; this diſtinction is now abſolutely ſettled. But there are caſes where, when a teſtator gives intereſt in the mean time; he gives a property in the principal, unleſs ſomething ariſes upon the face of the will to take off the force of it." The Chancellor then read the will and ſaid, "if the words, 'when he ſhall have attained 25,' had been left out, and it had been, 'I give to *C. F.* a thouſand pounds, which I empower my executors, &c. to lay out at intereſt and apply for his education, and to pay the reſidue at 25,' this would be annexed to the payment only. There is a direction for diſpoſal of part of the principal to put *C. F.* out apprentice, for though the word is *empower*, yet it is obligatory upon the executors to lay out 1000l. upon ſecurities, and they may if they pleaſe take the greateſt part of the principal for this purpoſe. This is ſomething like the caſe in Lord *King*'s time, of the *Attorney General*, and *Hall*, (8 Vin. Abr. 103, pl. 50,) where the teſtator gave a legacy to one for life, and ſo much as he did not diſpoſe of, to a charity, it was held that the

(*q*) 2 Ventr. 342. Stapleton *v.* Cheales, Ch. Pre. 317. (*r*) Fonnereau *v.* Fonnereau, 3 Atk. 645.

legatee might dispose of the whole, so here, if for the legatee's benefit they might take almost the whole to place him out apprentice." The decree was in favour of the representative of the legatee.

(s) *B.* by his will gave 100l. to *T. H. at* his age of 21, and directed the interest in the mean time to be paid to his mother for his maintenance. *T. H.* having died under age, the question was, whether this was a vested legacy? And Lord *Thurlow*, C. said, it was impossible now to contend, that where the interest of a legacy is given to the legatee, until the time of payment of the principal, that it is not a vested legacy, and that the gift of the interest for his maintenance was precisely the same thing.

(t) *C.* bequeathed to his godson *T.* the plaintiff, the sum of 50l. to be paid to him at the age of 21 years, or day of marriage, which should first happen, and he directed the same to be put out at interest, in the name of his executors and administrators, and the interest arising therefrom from time to time, to be applied towards *T.*'s maintenance and education; and if he should die before 21 or marriage, he gave the legacy to his executors in trust for the poor of *S.* and after disposing of his residuary estate, the testator appointed *H.* executor. The executor having paid over the residue and retained the legacy, became a bankrupt and obtained his certificate. The legatee afterwards attained 21, and one of the questions was, whether he had a claim upon the executor for the 50l. which depended upon this, whether the legatee took a vested interest before 21, which might have been proved under the commission, for if he did, then his right was barred by the certificate. And by the *Master of the Rolls* "This was a vested legacy, and as such might have been proved, under the case of *Green* v. *Pigot*, (1 Bro. CC. 103.) The giving interest always vests personal legacies. It was therefore vested, subject to be divested upon the legatee's dying under 21, and although it might not have been proveable as a debt, yet the guardian upon petition would have been permitted to prove it. The certificate must bar this, as it makes the bankrupt a new man."

(u) *D.* bequeathed to his three grand-children 500l. a-piece, 4-per cent. consolidated Bank Annuities, when they should respectively attain their ages of 21, or be married, which should first happen, provided such marriages were had with the consent of his executors and trustees; and he directed the interest of the annuities, so given to his grand-children, to be laid out

(s) Hoath *v.* Hoath, 2 Bro. CC. 3. *(t)* Walcott *v.* Hall, 2 Bro. CC. 305. *(u)* Hanson *v.* Graham, 6 Ves. Jun. CC. 239—249.

at the diſcretion of his executors and truſtees, in ſuch manner as they ſhould think proper for the benefit of the legatees, until they attained their ages of 21, or married, and for no other uſe, intent or purpoſe whatſoever. The teſtator then gave the reſidue of his perſonal eſtate to his ſon *T. D.* whom he appointed executor. One of the grand-children, after ſurviving the teſtator, having died inteſtate at the age of nine years, the queſtion was, whether the plaintiffs, her next of kin, or the reſiduary legatee of the teſtator were entitled to the legacy? which depended upon the circumſtance, whether the deceaſed grand-child took a veſted intereſt or not in it? And the *Maſter of the Rolls* ſaid, "It is contended that the plaintiff's are intitled, becauſe intereſt is given, and that they come within an eſtabliſhed rule of the court, that though ſuch words are uſed as would not have veſted the legacy, yet the circumſtance of giving intereſt is an indication of intention, explanatory, and denoting that the teſtator meant the whole legacy to belong to the legatee. On the other ſide it was contended, that the intereſt is not ſo given, as to bring it within the general rule, but what is given is more like maintenance. It is true it has been held, that has not the ſame effect as giving intereſt, upon this principle that nothing more than a maintenance can be called for: (*u*) what can be ſhewn to be neceſſary for maintenance: however large the intereſt may be; and therefore what is not taken out of the fund for maintenance muſt follow the fate of the principal, whatever that may be. But by this will it is clear, the whole intereſt is given. Can there be any doubt, that in this caſe, all the intereſt became as it fell due, the abſolute property of theſe infants, as ſeparated altogether from the reſidue? All that is left to the truſtees, is to determine in what manner it may be beſt employed. It is not merely ſo much of the intereſt as ſhall be neceſſary for the maintenance, but the intereſt intirely, ſeparated from the principal. It is therefore the ſimple caſe of intereſt. It was obſerved for the defendant, that here is not only the period of the age, but alſo marriage with conſent, and it was aſked, ſuppoſing any of them had married without the conſent of the executors, was it to veſt? That is juſt the ſame queſtion. If it is ſhifted to the queſtion, whether it is to be paid, if any of them married without conſent, the executors might ſay no: the period of payment has not arrived. But marriage with conſent is not a condition precedent; for at the age of 21, whether married with conſent, or not, they would be intitled. That, therefore, not operating

(*x*) Pulsford *v.* Hunter, 3. Bro. CC. 416. ſtated *ſupra*. Lord Thurlow thought that giving *maintenance* was not equivalent to giving *intereſt*.

as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest, which according to the established rule has the effect of vesting it. I am therefore of opinion that the plaintiffs are intitled."

It appears that a distinction is to be made, in regard to the vesting or non-vesting of legacies, between cases where interest is given upon legacies and provision is made for support of the legatees in some other manner, prior to the payment of their legacies, as when a sum of money is set apart for the purpose, or when the produce of a fund distinct from the legacy is directed to be applied *(y)*: for it is obvious that the principle which applies in favour of the vesting of legacies, when the intermediate interest is given, does not extend to cases of the latter description; it has therefore been decided, that such provisions will not have the effect of creating vested interests in legacies, before the times appointed for payment of them.

It is a rule in the construction of contingent executory bequests of personally, that the interests of the first and subsequent takers vest *uno instanti*, so that if the legatee die before the contingency happens, his representative will be intitled to the legacy, so soon as the event shall take place *(z)*: accordingly if a bequest were made in favour of *B.* upon the contingency of *A.*'s death without leaving a child or children, although *B.* should happen to die in the life-time of *A.* yet *B.*'s representative would be intitled to receive the legacy upon the happening of the contingency on the ground of it being a vested interest in *B.* previously to his decease. Accordingly—

(a) *A.* made his wife executrix, and gave her all his goods and chattels, provided that if she should die without issue by him, then after her decease, the same were to remain to his brother *J. S.*—*J. S.* after surviving the testator, died in the lifetime of the widow, who afterwards died without issue; and one of the questions was, whether as the legatee died before the widow, the legacy was gone, or his representative was intitled to it? which depended upon this, whether it was a vested interest in the legatee upon the testator's death? And it having been determined that the event upon which the legacy was given to *J. S.* was not too remote, Lord *Parker*, C. said he was of opinion that this *possibility* would go to the executors of the legatee: That it was true some cases were put in *Swinburne* 461—462, &c. which seemed to import the contrary, but those cases were so darkly put, and with so many inconsistences, as to be all over-balanced by the opinion of Lord

(y) The last case, and Atkins *v.* Hiccocks, *suprà*. *(z)* Chauncy *v.* Graydon. *Infrà*. *(a)* Pinbury *v.* Elkin, 1 P. Will. 563.

Nottingham in 2 *Ventr.* 347, (*anonymous caſe*) where a man deviſed 100l. to *A.* at the age of 21 years, and if *A.* died under age, then to *B.* *B.* died in the lifetime of *A.* and afterwards *A.* died under age, yet decreed that the executors of *B.* ſhould have the legacy of 100l. Lord *Parker* therefore decided in favour of the repreſentative of *J. S.*

(*b*) *A.* by his will bequeathed the reſidue of his perſonal eſtate in truſt for his wife for life, and after her death to their children, and if his wife ſhould live until ſuch children attained their ages of 21, then he directed his truſtees to transfer the ſecurities in which the reſidue ſhould be inveſted, unto his wife and ſuch children who ſhould attain their ſaid ages, or the ſurvivors or ſurvivor of them equally: but if it ſhould happen that his wife ſhould die leaving no ſuch child or children living at her death, then he directed his truſtees, &c. to transfer all ſuch ſecurities unto his brothers, *J. A.* and *H. A.* and if any or either of them ſhould be then dead, to the ſurvivor for his own uſe and benefit. The teſtator died without leaving iſſue by his wife; and *H. A.* ſurvived his brother, but both died after ſurviving the teſtator in the lifetime of the widow. The queſtion was, whether the plaintiff, the executor of *H. A.* the ſurviving brother, was intitled to the whole reſidue? which depended upon this, whether it was a veſted intereſt in *H. A.*? And by Lord *Thurlow*, C. "The caſe in Ventris (anonymous, 2 Ventr. 347) is confirmed by *King* v. *Withers*, (Forreſt 117.)—A contingent intereſt may veſt in right, though it does not in poſſeſſion. I take it to be clear that if a teſtator give a legacy upon a contingency, unleſs the contingency happens, the legacy does not veſt; but the caſe of an executory deviſe is, that the intereſt of the firſt taker, and that of the ſubſequent taker veſt at the ſame time. Contingent or executory intereſts may be as completely veſted as if they were in poſſeſſion. In the caſe in *Ventris*, the contingency was only as to the poſſeſſion, but there the intereſt was ſo veſted that it might be tranſmitted." His Lordſhip therefore declared that ſubject to the widow's life-intereſt, the reſidue veſted in *J. A.* and *H. A.* as joint-tenants: and that as *H. A.* ſurvived his brother, ſuch reſidue, ſubject as aforeſaid, belonged to the plaintiff his executor.

Alſo when legacies are given at future periods which muſt arrive, in the nature of remainders, as in the inſtance of a bequeſt of 100l. to *A.* for life, and after his death, to *B.* the intereſts of the firſt and ſubſequent takers will veſt together, and although *B.* happen to die before *A.* yet *B.*'s repreſentative will be in-

(*b*) Barnes *v.* Allen, 1 Brown, CC. 181, 3 Veſ. Jun. CC. 208, in notis. In the laſt book the words are taken from the regiſter's book.

titled to the legacy after *A.*'s death (*c*): In order to illustrate this;—

(*d*) *A.* bequeathed 3000l. to trustees, to place out at interest, and permit his wife to receive the same for life; the will then proceeded, "and after her decease, to divide the whole principal, with all interest and profits among my four children, share and share alike, and the survivors of them, but not before they shall have respectively attained the age of one and twenty years, or days of marriage, which shall first happen, for my mind and intent is, that if any of my four children shall die before they attain their age of 21 or days of marriage, that his, her or their shares so dying shall go and be equally divided among the survivors of them." *C.* one of the four children, having attained 21, died before her mother, having first married *W.* And one of the questions was, whether an interest in the legacy vested in *C.* so as to be transmissible to her husband her representative? or whether such interest was to be considered contingent, during the mother's life, and therefore not transmissible to the husband? And by *Parker*, J. "It seems to me very clear that this is an interest vested in *C.* at her age of 21, and the words 'survivors of them,' in the latter clause, plainly mean such survivors, as should be living at the death of the child before 21, and not such as were living at the death of the mother; and as the contingency therefore has not happened, it certainly vested in *C.* and will go to the plaintiff as her representative."

(*e*) *B.* bequeathed to trustees 800l. to pay to his wife the interest for life, and *from and after her death*, he gave and disposed of *the said sum of* 800l. in manner following, &c. After several intermediate devises and bequests, *B.* gave the legacy upon which the question arose, "I *also* give to *J. M.* son of my brother *G.* the sum of 100l." *J. M.* having survived the testator, died before the widow, and the question was, whether he took a vested interest in the legacy, so as to transmit it to his representatives? And by *Lord Loughborough*, "Two points have been contended: 1st, that this is a single legacy, payable out of the assets, not an *aliquot* part of the 800l. As to that, though it is not clear from the pencilling of the will, yet, it is contrary to the sense of the parties, and the apparent intention of the testator. The 2d. is, that, if part of the 800l. it is lapsed by the death of the legatee. The 800l. is a gift to the trustees, to pay the interest to the wife for her life, and then in parts and shares. That shews his intent to be to give

(*c*) See Harrison *v.* Foreman, *infrà*. Also Excel *v.* Wallace, 2 Ves. 118. S. P. (*d*) Weedon *v.* Fell, 2 Atk. 123. (*e*) Monkhouse *v.* Holme, 1 Bro. CC. 298.

a veſted intereſt to the ſeveral legatees. But this is ſaid to be contrary to the rule of not veſting legacies given by words *de futuro*. I rather take the rule to be, that where the time is annexed not to the form, but to the ſubſtance of the gift, there it lapſes by the death of the legatee. There are inſtances both ways in *Dyer*, 59. b. on the will of *Lord Latimer*. The rule in legatory caſes is taken from the civil law. It is of importance that the rule ſhould be the ſame in both courts; there is much upon it in *Swinburne*, 30—34, with various limitations and exceptions, but there is little preciſion in it; but the authorities there cited, upon being examined, clear the matter. The *Digeſt*, L. 36. Tit. 2. L. 21. *Si dies*, ſays, *Si certa ſit dies legati, ſtatim cedit; Si incerta, niſi tempus obtigit, neque res pertinere, neque dies legati cedere poteſt.* If the day is certain, it is veſted; but where uncertain, the true queſtion will be, whether it is the nature of "a condition," for if it is conditional, then in the very nature of the thing, the time is annexed to the ſubſtance of the gift, as in the caſe of marriage, of puberty, or of any other ſituation of life; when the arrival of the time is a condition, without which the teſtator would not have made the gift. In *Cloberry's* caſe, 2 Ventr. 342, *Lord Nottingham* ſaid, the giving intereſt ſhews no contingent legacy was intended. The *anonymous* caſe in 2 *Ventr.* 347, approved in *Pinbury* v. *Elkin*, 1 Wms. 566 (*f*), I take to be good law; the limitation over was not in the nature of a condition. *Corbet* v. *Palmer*, 2 Eq. Abr. 548, is to the ſame effect. In *Lowland's* v. *Stephenſon*, in the Exchequer, 1773, the legacy was held to be veſted. In *Killet* v. *Dawſon*, (1 Bro. CC. 119.) before Lord *Thurlow*, it was not a condition, but held to be veſted. *Barnes* v. *Allen* (*g*) was to the ſame effect. *Norris* v. *Huthwaite*, (1 Bro. CC. 182. note,) in the Exchequer a few years ago, was cited againſt this, but if the note that was read was taken accurately, I do not agree with the rule there laid down, that a legacy given in future, where the legatee dies before the time lapſes; but where the time is annexed ſo the ſubſtance of the gift as I before ſaid. *Smith* v. *Salmon* (in the Exchequer, 23d June, 1778,) is not a caſe from which one can reaſon; the penning of the will was extremely ſpecial, and the Lord Chief Baron has told us, the determination went upon the ſpecial penning of the will. There is a caſe which has not been cited, that is ſtronger for veſting than moſt of thoſe which have been quoted. It was in the Houſe of Lords, in 1727, and is correctly ſtated in Mr. *Brown's* caſes in Parliament, upon an appeal from Lord *King*. (*Love* v. *L'Eſtrange*, 3 Brown. Parl. Ca. 337.) (*h*) That the words

(*f*) *Supra.* (*g*) *Supra.* (*h*) *Supra.*

there were annexed to the gift, was very clear; but the probable ground of determination is, that it was a residue. One might have expected a different determination, if it had been the case of a general legacy. The circumstance of introducing a legatory subject by the word 'after,' cannot be construed so to effect the gift as to make it a condition. The solid substantial distinction is, whether the testator meant it as a condition. This cannot be construed as making a new rule of law. The rule, which I take to be that of the civil law, not being broke in upon, but allowed and construed as it was by Lords *Talbot*, *Hardwicke* and *Thurlow*; we are all of opinion that the legacy vested, and that interest must be paid from the death of the wife."

(*i*) *C.* having given by her will several annuities bequeathed after the decease of the annuitants, 50l. to each of the children of *D. R.* *D. R.* then had seven children, six of whom died in the lifetime of the surviving annuitant, and one of the questions was, whether any interest vested in the six children, as they did not survive the last annuitant? And the Lord *Chancellor* decreed, that they took vested interests.

(*k*) *D.* bequeathed the whole of his estate to *M.* "in order to pay the income to my mother *H. L.* for life, my intent being that she should enjoy the same during her life: but after the death of *H. L.* I *then* give (to five persons) the sum of 500l. each, 3-per cent. annuities, and to *J. B.* and *E.* his sister the sum of 100l. each, 3-per cent. annuities, all the rest and residue I give to my executor, and I hereby empower him to dispose of by will the residuum he will be intitled to after the decease of my mother." *J. B.* survived the testator, but died in the lifetime of *H. L.* the question was, whether *J. B.* took a vested interest in the 100l. 3-per cent Annuities, so as to intitle his representative to call for it after the death of *H. L.*? And the *Master of the Rolls* thus expressed himself "The cases have proceeded upon very nice distinctions. Nothing can be more truly called *vexata quæstio*, as appears from the rules laid down in *Hall* v. *Terry*, 1 Atk. 502. and *Lowther* v. *Condon*, 2 Atk. 127—130. If this were a devise of real property, there is no doubt but it would be a vested remainder, and it seems reproachful to the law, that the construction should be different when applied to different species of estates: but it is said, that there is a rule of the civil law affecting this subject, and undoubtedly the decisions of that court, ought to have weight in this court. That rule appears from *Swinburne* to be, that where it is clear, that the intention of the testator was, that the legacy should be future, the law, and common sense supports it, says it shall

(*i*) The Attorney General *v.* Crispin, 1 Bro. CC. 386. (*k*) Benyon *v.* Maddison, 2 Bro. CC. 75.

not be paid, if the party does not ſupport the character or ſituation required by the will. I take it the word, *then*, in the preſent caſe, is not to be conſtrued as an adverb of time; and I thought the queſtion had been ſettled by the deciſions. If it be of any weight what the opinions of the bar were; the caſe of *Norris* v. *Huthwaite* was decided againſt thoſe opinions. The caſe of *Pinbury* v. *Elkin* (*l*) is worth looking into. The queſtion was much diſcuſſed at the bar. The brother in that caſe died before the contingency happened, which was in favour of the executrix. In the caſe of 2 Ventr. 347, there cited, the caſes in *Swinburne*, which ſeem *contrà*, were over-ruled. That caſe was approved of by Lord *Parker*. I do not mean to remove the rule, that where a legacy to a perſon requires, that he ſhould acquire a particlar ſituation, there the legacy ſhall not veſt, or in the caſes of portions to children, that they ſhall not veſt; but conſidering the preſent as a mere money-legacy, I think it does not fall within the rule." The decree was in favour of the repreſentative of the legatee.

(*m*) *E.* being intitled to 500l. ſecured upon mortgage, by will directed her executors to permit her late huſband's niece *S.* the wife of *M.* to take the intereſt for her ſeparate uſe during life, and if the mortgage ſhould be paid off, then ſhe directed the money to be laid out in government ſecurities to the ſame uſe, and after the deceaſe of *S. M.* ſhe gave the principal ſum to the ſon and daughter of *S. M.* by her former huſband *M. W.* equally between them; but if either of them ſhould die before the deceaſe of their mother, the whole to the ſurvivor. *L.* the daughter of *S. M.* married *J. W.* and died in the lifetime of her mother and brother. Her brother aſſigned the 500l. to the plaintiff, and died inteſtate, before his mother. The plaintiff obtained adminiſtration to him. The mother being dead a queſtion aroſe whether the plaintiff was intitled as aſſignee and adminiſtrator of the brother to the *whole* of the 500l.? And by the *Maſter of the Rolls*, "The plaintiff claims a legacy of 500l. ſecured upon mortgage as aſſignee, and alſo as adminiſtrator of *B. C.* (the brother). In this laſt character of adminiſtrator, it is, that I think he is intitled: it will therefore be liable to the debts of *B. C.* The firſt queſtion is whether *B. C.* was himſelf intitled; that is, whether under the words of the will, the intereſt upon the death of the ſiſter veſted in him. It is contended on one ſide that as they both died in the lifetime of *S. M.* either the legacy ſhould be equally divided between their repreſentatives, or neither of them ſhould claim. On the other ſide ſeveral caſes are cited to ſhew that the legacy veſted, *Hutchins* v. *Foy*.

(*l*) *Supra*. (*m*) Scurfield *v.* Howes, 3 Bro. CC. 90.

Comyns, 716. *Killet* v. *Dawson* (1 Bro. CC. 119). *Benyon* v. *Maddison* (*n*). But it is settled now that such a legacy is vested. I am therefore of opinion that on the death of *L.* it survived to her brother, and the plaintiff, as administrator, is intitled to this legacy."

(*o*) *F.* by his will, directed the interest and produce of his residuary estate to be paid to his two sisters *H. L.* and *A. C.* in equal shares for their lives, "and after their decease the principal to be paid to their children, share and share alike; but whichever sister died before the other, then the share which was so paid to her, should be paid to her children in equal proportions, but if such sister so dying should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid." *A. C.* died without leaving children. *H. L.* had two children at the testator's death, and two others afterwards, but the plaintiff was the only child living at her death, and as such claimed the whole residue under the idea that the gift to the children was contingent until the death of the surviving sister. But it was contended for the assignees of two of the other children, that the first words completely disposed of the property after the death of the two sisters, by words that clearly gave it to all the children, and that there was nothing to undo that in the subsequent expressions, which were only applicable to the life-interests of the two sisters, and did not touch the principal. And by the *Master of the Rolls*—"I cannot control these general words by this strange expression; for the consequence of that construction would be, that though there might have been many children, yet if the surviving sister died without leaving any children, it would be undisposed of. The principal reason in *Spencer* v. *Bullock* (*p*) was, I think that there were three children at the death of the testator, and he makes a disposition of it in the event of there being only one child. Therefore I held the time of vesting suspended. This property vested in *all* the children."

(*q*) *G.* devised and bequeathed both his real and personal estate and effects to *P.* in trust to pay the annual amount, profit, and produce, to his mother *A. W.* and his sister *A. B.* for their lives (the moiety which his sister should be intitled to, and should receive during his mother's life, being intended for her separate use and benefit) and from and after the death of his mother and sister and the survivor of them, in trust to pay and apply the same to and for the use and benefit of all and every the child and children of his sister, which should or might be living at the time of *her* death, share and share alike,

(*n*) *Supra*. (*o*) Taylor *v.* Langford, 3 Ves. Jun. CC. 119. (*p*) *Infra*. (*q*) Wadley *v.* North, 3 Ves. Jun. CC. 364.

each receiving his or her reſpective ſhare of the principal, upon his or her attaining the age of 21 *years*, and if one child ſhould be ſo ſurviving, then in truſt to pay and apply the whole to ſuch ſurviving child, *upon his or her attaining the age of* 21 *years aforeſaid.*" *A. B.* and *A. W.* having ſurvived the teſtator, died, the former in the year 1790, and the latter in 1793. *A. B.* had four children living at the teſtator's death, two of whom died, after ſurviving their mother, in the life of *A. W.* and under 21. Their father adminiſtered to them, received their ſhares, and became a bankrupt. The bill was filed by the ſurviving children, and one of the queſtions was, whether the two deceaſed children took veſted intereſts before the age of 21? And by the *Maſter of the Rolls*, "The only queſtion now remaining is, whether any veſted intereſt accrued to the children before the age of 21. If the teſtator had ſtopped at the words 'each receiving his or her reſpective ſhare of the principal thereof, upon his or her attaining the age of 21 years,' there could be no doubt upon the principles laid down in theſe caſes, as well as that adopted in *Batsford* v. *Kebbell* (*r*), that it would be a veſted intereſt, the principal being given, the payment poſtponed: but it is contended, that the word 'ſurviving' in the next clauſe, muſt refer not to ſuch child as ſhould ſurvive the mother, upon which ſurvivorſhip the legacy was firſt given, but to ſuch as ſhould ſurvive the mother, and alſo ſurvive the age of 21. Take the words as they ſtand, 'and if but one child ſhould be ſo ſurviving, then in truſt to pay and apply the whole to ſuch ſurviving child.' It does not ſtop there, if it had, there would be more reaſon to contend, that it meant both ſurviving the mother, and likewiſe the age of 21: but it ſays 'upon his or her attaining the age of 21 years, as aforeſaid.' It was perfectly nugatory to put in thoſe words, if it meant ſurviving both the mother and the age of 21, therefore upon the true conſtruction, whether he did or did not mean, that it ſhould apply to both, the only ſurvivorſhip that appears to me to which he could refer, was ſurviving the mother. In *Batsford* v. *Kebbell*, the Lord Chancellor ſtates the diſtinction, which I believe is the caſe, that in all theſe caſes there has been a gift of the principal legacy, and a poſtponement of the payment; but in that caſe there were no words of gift of the principal, but merely of the dividends, and then the principal to be transferred at a particular age, and therefore it was not veſted till that time. That is not the caſe in the preſent inſtance, for here the principal is given by expreſs words, and limited to all the children living at the death of the teſtator's ſiſter; and I am of opinion that upon the true con-

(*r*) *Supra.*

struction, coupled with the principles laid down as to vesting, it must be to all the children, and the survivorship is only with reference to the mother. Consider the consequence to the other children, if I am obliged to adopt the contrary construction, for according to that if these children die before the age of 21, nothing at all is given, which adds much strength to the ground I take. The court would hardly put upon a will a construction that would create an intestacy, if it could be avoided. The construction I adopt is farther strengthened, by the time pointed out in this will; which is the time at which the law would give it. If a farther time is specified, which was the case in *Batsford* v. *Kebbell*, it may be supposed, the time may constitute one of the grounds, upon which the legacy should vest, but when the time appointed is only that at which the law would put them in possession, it very much fortifies the argument, that it is not meant as the time, at which it should vest, but only at which they should take possession."

Although the amount and proportion of the shares of the legatees or takers subsequent to the death of the person taking a life-interest in the legacy be subject to an alteration, from a power of appointment vested in him, or in any other person, such power will not be permitted to prevent the legacy from vesting in the legatees or subsequent takers.[s] Suppose then a legacy to be given among the children of *B.* equally, after the death of *A.* but subject to his appointment, according to the above proposition, such power would not suspend the immediate vesting of the legacy among the children of *B.* in equal shares, though such shares would be liable to be divested and modified, as to the amount of each child's proportion, upon the exercise of the power by *A.*—For example;—

(*s*) *T. L.* by his will gave 1000*l.* stock in trust to pay the dividends to his daughter *Anne Malim*, for life for her separate use, and after her death the principal among her children: if no children, to sink into the residue. He gave 500*l.* stock to *Elizabeth Thompson*, and a similar sum to *Sarah Lowe*, two other daughters; and declared trusts, in failure of which those sums should sink into the residue. He then gave all the residue of his estate and effects in trust as to one third, for his daughter *Lucy Rawlin*, for her separate use for life; after her death for her husband for life; and after his decease for the children; as to another third, for *Elizabeth Thompson*, for her separate use for life, and after her death for her children; with a proviso, that if she should survive her husband, and marry again, she might by writing under her hand and seal, executed before such marriage, in the presence of two witnesses, direct

(*s*) Malim *v.* Keighley and Malim *v.* Barker, 2 Ves. Jun. CC. 333. 3 Ves. Jun. CC. 150.

the intereſt, &c. to be paid after her death to ſuch huſband for life; as to the other third, for *Sarah Lowe* and her children in the ſame manner, and with a ſimilar power in caſe of her marriage; and in caſe either of theſe daughters ſhould leave no children, the ſhare of ſuch daughter was to go to the other two daughters in the ſame manner as their reſpective funds. The will then proceeded thus,—"And in caſe the whole of the reſidue of my perſonal eſtate ſhall become veſted in any one of my ſaid daughters, then I do give and bequeath the ſame after the expiration and determination of the ſeveral truſts before mentioned, unto ſuch ſurviving daughter, her executors and adminiſtrators, hereby recommending it to ſuch daughter to diſpoſe of the ſame after her own death, and the determination of the ſeveral truſts aforeſaid unto and among the children of my ſaid daughter *Anne Malim*, and my nephew *John Lowe* of, &c. deſiring that his reputed daughter *Emelia*, though born before marriage, may be conſidered as one of his children." The whole reſidue became veſted in the teſtator's daughter *Sarah*, who married *K.* and died in 1793, inteſtate and without iſſue. The teſtator died in 1761. At the death of *Sarah*, *Anne Malim* had four children living, and *John Lowe* had three children living. Two of the children of *Anne Malim* were born after the teſtator's death. It having been determined that the words of the will were ſufficient to create a truſt in favour of the children of *Anne Malim* and *John Lowe*, the queſtion was, whether ſuch of the children who ſurvived *Sarah K.* as were born after the death of the teſtator were intitled equally with the reſt? There had been alſo other children who died in the lifetime of *Sarah*. And by the *Maſter of the Rolls*, "The firſt point in this cauſe was, whether there was an abſolute truſt for theſe children upon this will; and it was determined, that it did raiſe ſuch truſt; that *Sarah K.* had only the uſe of the fund for life, with a recommendation operating as a truſt to diſpoſe of it among them. The queſtion now is, to whom the money is to be diſtributed. There is no doubt that the children living at the death of *Sarah K.* though born after the death of the teſtator, are intitled. The next queſtion is as to thoſe, who died in her life; whether it is not a truſt for all the perſons deſcribed; who are all the children. How are you to exclude thoſe who died in the life of the tenant for life? It is ſaid, that being a power of appointment, it muſt mean, that it ſhould be appointed in favour of ſuch of the children as ſhould be living at the death of this daughter: but that is not the conſtruction for two reaſons: firſt, becauſe there is a caſe, in which he gave theſe ſiſters, in the event of their huſbands ſurviving them, a power of diſpoſing to their huſbands

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for their lives: ſecondly, which makes it impoſſible to confine it to thoſe living at the death of *Sarah K.* it was not neceſſarily to be done by will: but ſhe might at any time during her life have appointed by deed in favour of any of the children, though they might not ſurvive her. Therefore upon the true conſtruction of theſe words I am clearly of opinion, that if ſhe had appointed, it was to be in favour of all ſuch children born after the death of the teſtator, whether they ſurvived *Sarah K.* or not. Every child who came *in eſſe* acquired a veſted intereſt, liable to be diveſted by the exerciſe of the power of appointment, and there being no appointment, I muſt conſtrue it as if there was no power; and it has been determined over and over, that in ſuch a caſe all children coming *in eſſe* ſhall take. It muſt, therefore, be referred to the maſter to inquire, whether any and which of the children of *Anne Malim* and of *John Lowe* died in the life of *Sarah K.* and who are their perſonal repreſentatives."

Caſes indeed may occur as exceptions to the rule before mentioned in regard to the intereſts of the firſt and ſubſequent legatees veſting *uno inſtanti*, upon the particular words in bequeſts, and the ſpecial circumſtances which attend them. Thus;—

(*t*) Archbiſhop *Wake* having ſix daughters, his only children, by deed poll, dated the 15th of April, 1728, reciting that he purpoſed by his will to give the ſurpluſs of his real and perſonal eſtate to *Ethelred*, his wife, for her life, and then to be at her diſpoſal, and to make certain perſons truſtees, directed in caſe he ſhould not make ſuch will, and his wife ſhould die without making any diſpoſition, that his truſtees ſhould, after his and his wife's death, ſell his real eſtate, and make an equal diviſion of the purchaſe-money, and of the reſidue of his perſonal eſtate, among his ſix daughters, ſhare and ſhare alike, and to pay and diſpoſe of the ſame accordingly as therein-after mentioned; that is to ſay, the ſhare of each daughter to be placed out at intereſt, and the intereſt to be paid to ſuch daughters reſpectively during their lives, and for their ſeparate uſe; and after their reſpective deaths, the ſhare of each daughter to be paid to all and every her children by her firſt huſband, except an eldeſt or an only ſon for the time being, equally to be divided among them; and if but one, then to ſuch only child; to be paid, to the *ſons at* 21, *and to the daughters at* 21 *or marriage*, with benefit of ſurvivorſhip in caſe of death before his, her, or their ſhare ſhould become payable: provided, that *in caſe all the children* of any of the ſaid daughters by her firſt huſband, *except as aforeſaid*, ſhould happen to die *before* any of their *reſpective ſhares ſhould become payable* as aforeſaid, then the ſhare or ſhares of ſuch

(*t*) Bennett *v.* Seymour, Ambl. 528. See alſo Liege *v.* Thickneſſe, *ſupra*.

daughter or daughters *ſhould go* and be paid to the *eldeſt* or only ſon of ſuch daughter or daughters reſpectively by ſuch firſt huſband, at his age of 21: *provided further*, that *in caſe one or more of his three eldeſt daughters*, (viz.) *Anne Seymour*, *Ethelred Bennett*, and *Heſter Brodripp*, *ſhould die without any child or children living at her or their reſpective deaths*, *or*, *there being ſuch*, *all of them ſhould die before their or any of their reſpective parts or ſhares ſhould become payable* by virtue of the truſts aforeſaid, *then*, and in ſuch caſe, *the part or ſhare of the ſame daughter or daughters ſhall from and after the deceaſe of the ſame daughter or daughters*, *and failure of her or their child or children*, go to all and every the child or children then living, or then after to be born *of the other or others of them*, *the ſaid three laſt-named daughters*, to be paid as the ſhare or ſhares of ſuch other of the ſame three daughters would have been payable to her or their child or children, by virtue of the truſts aforeſaid, if ſuch other daughter or daughters had been then actually dead; and in caſe all the ſaid three eldeſt daughters ſhould die without child or children living at their reſpective deaths, or, being ſuch, all of them ſhould die before their or any of their reſpective ſhares ſhould become payable by virtue of the truſts aforeſaid, then the ſhare or ſhares to go to the child or children then living, or then after to be born of the three youngeſt daughters. The like proviſo with reſpect to the ſhares of the three youngeſt children, with the ultimate limitation over to the three eldeſt children. *Ethelred*, the wife, being dead without making any appointment, the Archbiſhop made his will, and deviſed the reſidue of his eſtate upon the ſame truſts as in the deed. *Heſter Brodripp* had iſſue by her huſband, *Richard Brodripp*, one ſon and a daughter, who both died *in the life-time of their mother*: the *ſon attained the age of* 21, and, dying inteſtate, left his mother and two ſiſters of the half-blood his next of kin. *Heſter* having ſurvived her huſband, married *Thomas Strode*, and afterwards died leaving *Strode* her huſband her executor. A decree having been obtained for carrying the deed and will of the Archbiſhop into execution, and the accounts being taken and the reſidue of his eſtate placed out in the name of truſtees, *Strode* and the perſons claiming under the half-ſiſters, now petitioned to have one part of the reſidue, being (*Heſter*'s ſhare) paid to them according to their intereſts therein. Alſo another petition was preferred by *Joſeph Love*, and *Bridget* his wife, as ſhe was the only younger child of *Anne Seymour*, to have one moiety of *Heſter Strode*'s ſhare paid to them. And the queſtion upon the two petitions was, whether, as *Brodripp* the ſon, attained 21, his mother's ſhare became veſted in him, and tranſmiſſible to his repreſentatives, or whether, as he died

in the life-time of his mother, although he attained the age of 21, and the mother left no issue living at her death, the limitation over to the children of the other two sisters took place? It was argued, that by the clause which gave the share upon the younger children's death to the eldest or only son, it would not go over to him, if any of the younger children attained 21, and afterwards died in the life-time of the mother. That the clause in question did not intend to alter the time of vesting, as appointed in the first clause, by postponing it till after the death of the mother; but that it must be understood and construed in this way: "If all the children die before their shares are payable, that is, before 21, whether in the life-time of the mother or afterwards, then to go over." On the other side it was argued from the words of the clause, which gave the share over if all the children died in the life-time of the mother. Lord *Hardwicke* was of opinion, that it was not a vested interest in *Brodripp* the son, and dismissed the petition of *Strode* and the next of kin. And upon the other petition, he ordered one moiety of *Hester*'s share to be paid and transferred to *Joseph Love*.

(*u*) *B.* by will gave to his executors 1600*l.* in trust to invest in stock, and pay or transfer such sum or stock to his son *John Spencer*, at the age of 21, and apply the dividends in the mean time towards his maintenance and education. He gave another sum of 1600*l.* upon a similiar trust for his daughter *Tabitha Spencer* at the age of 21 or marriage. He also gave another sum of 1600*l.* to be laid out in the same manner, and to accumulate during the life of his son-in-law *John Hart*; and after his death, the principal with the accumulated dividends to be transferred to his daughter *Elizabeth Hart*, for her own use and benefit; and if she should die in the life of her husband without leaving any issue of her body, he directed the said sum to sink into the residue. All the residue of his estate and effects he gave to the executors to be equally divided among his four children, *Jane Evans*, *Elizabeth Hart*, *John Spencer*, and *Tabitha Spencer*, share and share alike; but he declared that the shares of his son *John* and his daughters *Elizabeth Hart* and *Tabitha Spencer* should be invested by his trustees, and in their names upon the like trusts, as he had before directed the legacies of 1600*l.* given to them respectively to be invested; and that the share of his daughter *Jane Evans* be invested in the names of his executors for her separate use for life, and the principal for her child or children as her decease, if more than one, share and share alike; *provided*, that in case either his son or any of his daughters should die, before

(*u*) Spencer *v.* Bullock, 2 Ves. Jun. CC. 687.

the legacies given to them reſpectively or their ſhares of the reſidue of his eſtate ſhould become payable, without having any lawful iſſue of their reſpective bodies, he gave the ſhare of ſuch of them ſo dying unto the ſurvivors of his ſon and three daughters reſpectively; provided that in caſe any of his children ſhould die before his, her, or their ſhares of his eſtate given to them ſhould become payable as aforeſaid, leaving any child or children of his, her or their reſpective body or bodies lawfully begotten, then the child or children of ſuch of his ſaid children, who ſhould happen to ſurvive their parent, ſhould be entitled to the ſhare or ſhares of ſuch parent, to be equally divided among them, ſhare and ſhare alike, if more than one, and if but one, then the whole to ſuch only child. At the date of the will *Jane Evans* had three children; *Ebenezer*, *Elizabeth* and *Juliana*, who all ſurvived her: at the death of the teſtator ſhe had three others, and three more after his death. Of thoſe ſix, three died in her life. The queſtion, at what time the ſhare of *Jane Evans*'s proportion of the reſidue veſted, aroſe after her death upon two petitions: one by *Ebenezer Evans* the younger, who having attained 21, claimed one ſixth of 1482l. 16s. 11d. ſtock, being one fourth of the reſidue; the other by *Ebenezer Evans*, the father, who claimed three ninth parts as adminiſtrator of the three deceaſed children. And by the *Maſter of the Rolls*, " This queſtion ought to have been decided upon a bill. I have changed the opinion I had formed upon this will, when it firſt came on. The proviſo is material; and though it is ſaid it cannot apply to the caſe of *Jane Evans*, I am of opinion, coupled with the affairs of the family, it is ſtrong to ſhew the intention. I deſire to be underſtood, that my opinion is chiefly grounded upon the circumſtance of *Jane Evans* having three children living at the execution of the will. If it had veſted in them, and they had died before the teſtator, the conſequence would have been that it would have become lapſed, and then it would have been part of the perſonal eſtate undiſpoſed of. I will not go through the caſes. In general the conſtruction ought clearly in my opinion to be in favour of the veſting of intereſts; and upon the circumſtances only, I think the ſhares do not veſt in this caſe. I admit that Lord *Camden* was for reverſing the decree in *Liege* v. *Thickneſſe*, (*x*) and argued very ſtrongly againſt it; but I underſtand it was approved by Lord *Thurlow* in *Lloyd* v. *Bird*. This teſtator anxiouſly ſtipulates, that if there is only one child, it ſhall go to that one. It is impoſſible he could mean the three then living to take veſted intereſts, which in caſe of their death before him would have made it an undiſpoſed of reſidue:

(*x*) *Supra*.

but I am clearly of opinion he meant at all events to dispose of that residue. Nothing therefore vested in the children till the death of their mother: but I desire to be understood that without these circumstances and this clause, I should not have been of the same opinion, for I think a gift to a child and at her decease to her children, without any thing else would give it to all the children she might ever have. The share of *Jane Evans* is therefore distributable in sixths, and the father is not intitled." Again—

(y) *C.* bequeathed to trustees an annuity of 200l. issuing out of the exchequer, in trust to pay the same to his sister *V.* for life, and after her death to assign the annuity, unto and for the use of all the children of his sister equally, and *if she should leave but one child*, then the trustees should assign all to that one. *V.* died without leaving any child living at her death, having had but one child, and a question arose whether the reversionary interest in the annuity vested in the child during the mother's life? and it was determined at the *Rolls*, that upon the events which had happened, the reversionary interest was lapsed, as it was merely in contingency during the mother's life, and that the time of her death was the period when the children were to take, for the will was clear, that the testator intended his sister's children, if more than one, should take as tenants in common, and if but one, at her death, then that one to have all: but if the interest were to vest in the children, as they came *in esse*, during their mother's life, their shares would be transmitted to their representatives, if they died before their mother, notwithstanding if one child only were living at the mother's death, it was to have the whole; of consequence the division of the annuity must be at the mother's death among such of her children, as should be then living, which construction rendered the will consistent in all its parts.

(z) *D.* reciting in his will, his marriage-settlement, in pursuance of a power therein, gave the share and parts of such stock as he had power to dispose of, to trustees in trust after the death of his wife without leaving issue by him, to pay his sister *Jane Daniell* the interest of 1000l. out of the stock for life, and after her death to pay the principal or produce to her two sons *James Daniell* and *Francis Daniell* equally in case they should be living at the time of their mother's death, but if either of them died before her, then to pay the principal or produce of the 1000l. to the *survivor* of them, and also to pay his sister *Margaret Sunderland* the interest of 300l. out of the stock for life, and the principal or produce after her death to her child

(y) Smith *v.* Vaughan, Vin. Abr. Tit. "Devise," 381. pl. 32.
(z) Daniell *v.* Daniell, 6 Ves. Jun. CC. 297.

or children, if more than one, equally; and moreover to pay his brother *Henry Mantell* the intereſt of 200l. for life, and the principal to his children in the ſame manner: but if *Margaret Sunderland* and *Henry Mantell* happened to die leaving no iſſue, then to pay the intereſt of the 300l. and 200l. to his ſiſter *Jane Daniell* for life, and after her death, the principal or produce to her children equally, but if only one child, then to that one. The teſtator having alſo recited that he was poſſeſſed of 2100l. Bank-Stock, 4-per cents, 1760, gave to one of his truſtees 100l. part thereof, and the reſidue to his truſtees to pay his mother *Jane Mantell*, the intereſt of 600l. ſtock, part of the laſt mentioned ſtock for life, and after her death to pay the 600l. to his ſiſter *Jane Daniell*. And as to the reſt of his ſaid ſtock in truſt to pay the intereſt or dividends to his wife for life, and after her death to his children equally, but if only one child, then the whole to ſuch child or to ſuch child or children with which ſhe might be *enſient*, and ſhould be born after his deceaſe: but if his wife ſhould have no child or children of his living at her death, then to pay the intereſt of 400l. part of the ſaid ſtock, to his ſiſter *Margaret Sunderland* for life, and after her death to pay the principal to her child or children equally, if more than one, and to pay the intereſt of 1000l. other part of the ſaid ſtock to his ſiſter *Jane Daniell* for life, and after her death the ſaid 1000l. to be paid equally between her two ſons *James* and *Francis Daniell*, or the whole to the *ſurvivor* of them. The teſtator died in 1766, and his wife had no children by him, ſhe married *Thomas Colby* one of the truſtees, and died in 1799. *Margaret Sunderland* died in the life of *Mary Colby* having never had any iſſue. *Jane Daniell* alſo died in the life of *Mary Colby*. *James* and *Francis Daniell* were her two only children. *Francis* died in 1793 inteſtate, after the death of his mother leaving *Ann Daniell* his widow and adminiſtratrix. One of the queſtions that aroſe was, whether *Francis Daniell* took a veſted intereſt in the 1000l. he having ſurvived his mother, but not the wife of the teſtator? And the *Maſter of the Rolls* decided as follows: "As to the 1000l. the only queſtion is, to what period the ſurvivorſhip relates. There can be no doubt upon that, when we ſee the limitations, firſt to the widow for life, then to the children, if no child then to *Jane Daniell* for life, then equally between her two ſons, or the whole to the ſurvivor of them. It is clear, that he meant the ſurvivor at the time of the diviſion. He did not conceive that would take place, till both his wife and *Jane Daniell* were dead. He conceived the deaths would happen in the order of the limitations. The mode in which he diſpoſes of the other ſum confirms inſtead of oppoſes this conſtruction, ſhewing that the period of diviſion was the period at which he intended it

to vest. He had the same meaning as to this fund. He who is alive when the division is to take place, takes the whole of the capital, which must be transferred accordingly to the plaintiff *Daniel*," the surviving brother.

It may so happen that the interest in a bequest may be vested in a legatee, and yet from the nature and circumstances of the gift, it may be considered personal, and determining with his life. Accordingly in a case where—

(a) *A.* bequeathed to his wife his real and personal estate for life, beneficially during his sons minority, which he directed should be considered as ending the first of November, 1805, upon condition that his said wife until that period should find his son with suitable education, maintenance and clothing, and after the determination of his son's minority, he gave him a moiety of his income. The testator then directed, that upon his wife's death, the whole of his property should belong to his son, but if such son happened to die during minority, he gave the whole of his estate to his wife for life. He also appointed guardians and trustees for his son, on the event of his wife dying while his son continued a minor, the wife did in fact die during the son's minority, having married *B.* who, as administrator to his wife, claimed such interest in the testator's estate during the infancy of the son, as she would have been intitled to, if she had continued to live during the whole of that period. Upon this claim, the *Master of the Rolls* gave the following judgment; " The question is whether there is an absolute bequest of the interest until the 1st of November, 1805. The disposition being general of all real and personal estate, no doubt he might have made that bequest, and if so it would pass to the representative of the wife, at the same time that would be a very extraordinary intention against his own son, giving the interest of his fortune to any stranger who might happen to be the executor or administrator of the widow. It is quite clear upon the whole, that he only meant this interest to go to her, provided she should live so long, and should be in a situation to find her son with suitable education, maintenance and clothing. The expression there, is, 'my said wife.' He does not trust that to any one else. He appears here not to have attended to the possibility, that she might die before that period. Then afterwards if she die during the minority, he appoints guardians and trustees. As it has been observed, there is no use for them, for there would be nothing to manage. The son would have been at the mercy of the wife to find him with education and maintenance, and that burthen it is admitted, would have passed to her representatives. He supposes there would in that event

(a) Ex parte Davies, 6 Ves. Jun. CC. 147.

be occaſion for guardians and truſtees, but this further proviſion occurs; if the ſon die during the minority, the whole is to reſt with his ſaid wife *during her life, not until* 1805. The conſtruction therefore is, that though as againſt ſtrangers, he meant it only to her for life, yet as againſt his ſon he meant to give it to her repreſentatives, putting ſtrangers in a better ſituation than his ſon, the meaning upon the whole is quite clear, and the petitioner (the huſband) can take nothing."

When the event upon which a legacy is given over, is rendered ſo obſcure by the teſtator's manner of expreſſion, as to render that event *merely conjectural*, as in caſes where the legacy is given over to *B.* upon the death of *A. before A. might have received it.* Or when it is given over upon a contingent event, which does not happen, as in the inſtance of a bequeſt to *B.* and *C.* as tenants in common, but if *either die during the life of D.* remainder to the ſurvivor, and both die before *D.* The legacies will in each caſe be conſidered veſted intereſts: In the firſt caſe the bequeſt is veſted and abſolute in *A.* immediately upon the death of the teſtator;—In the ſecond, the legacies to *B.* and *C.* will not be defeated by the deaths of the legatees before *D.*; for a clear veſted intereſt will not be diveſted by a contingency which never happened. The following authorities will elucidate the above obſervations;—

(*b*) *A.* reciting in his will of 1781 that his fortune was entirely of his own acquiring, conſiſting of about 8627*l.* and was all veſted in ſecurities in the Eaſt-Indies, gave ſeveral legacies, ſome abſolutely, but moſt of them were diſtinct legacies to ſeveral of his brothers and ſiſters for the proper uſe and benefit of each legatee, with a clauſe to each directing, that if the legatee ſhould die before he or ſhe "might have received the legacy, it ſhould go to the children of the legatee equally, and in default of iſſue among the other brothers and ſiſters." *A.* then reciting how much theſe legacies would amount to, gave the reſidue, after having calculated the amount of it, to his father for his own uſe and benefit, "But in caſe of his death before he might have received the reſt and reſidue of my eſtate before mentioned," he gave it to his brothers and ſiſters before mentioned, and their children. He appointed the defendant executor, and died ſoon afterwards. His father died in 1784, without having received any part of the reſidue, and the ſuit was inſtituted by the brothers and ſiſters of the teſtator, to whom the reſidue was given over, claiming it upon the event of the father's death, before he received it. It was inſiſted for them by the *Solicitor General*, that the meaning of the teſtator muſt be this, and was ſuggeſted to him by his ſituation, that of his

(*b*) Hutchin *v.* Mannington, 1 Veſ. Jun. CC. 366.

relations here, and the property. He ſeemed to have recollected, that the property muſt be ſent over; and did not mean to veſt any intereſt in his relations here, merely becauſe they might happen to ſurvive him, but if they did not live to receive it, he intended to ſubſtitute other perſons to take it. It was impoſſible he could mean the ſame thing as if he had ſaid, "I give it in caſe of their ſurviving me." Suppoſe it was a real eſtate deviſed upon truſt to ſell with all poſſible diligence, or in a reaſonable time, the court would enquire into that, and make the executors pay coſts, if they did not follow the directions. So in this caſe, there ought to be an inquiry, within what time the father might have received it. That the plaintiffs ſaid, the eſtate could not be got in, in India, before the father's death. But by Lord *Thurlow*, C. "I cannot find any topick of argument to reaſon this upon. Suppoſe any of theſe legatees had died, within a year after the teſtator, there might then have been ſome ground for ſaying, that the teſtator alluded to the known practice of the court to compute intereſt upon legacies from a year after the death of the teſtator. I rather believe he had ſome ſuch purpoſe, as you attribute to him, in his contemplation. There is a faint indication of a purpoſe, that there ſhall be ſome time or other, when theſe intereſts ſhall go over, and that they ſhall not veſt in the mean time. But has he conceived that intention, and expreſſed it with ſuch definite certainty, that I can act upon it? I am to compute, what time would be ſufficient to enable thoſe parties to receive their legacies. It is all too uncertain. Suppoſe they lived and claimed their legacies: they muſt have been computed with intereſt from a year after the death of the teſtator, if no other time was appointed. If he had given any time, I agree that the intention is to prevail, if it can be found out, (though a teſtator cannot make an executor anſwerable for intereſt beyond what the law has done,) but he muſt give me ſome rule to go by. Suppoſe he had given a real eſtate in the manner you ſpecify; it is clear that it will neither depend upon the caprice of the truſtee to ſell, for that would be contrary to all common ſenſe, nor upon his dilatorineſs: in ſome way it may be ſold immediately. But I ſhould not inquire when a real eſtate might have been ſold with all poſſible diligence, for it might the very next day or that very evening, and therefore the court always in ſuch a caſe conſiders it as ſold, the moment the teſtator is dead; for where there is a truſt, that is always conſidered here as done, which is ordered to be done, and the court cannot meaſure the time. Suppoſe this property had been in the *Weſt-Indies*, it would have required leſs time to be remitted; ſtill leſs if in *Jerſey* or *Cumberland*; and if only 100 miles off, it would have coſt a journey of two days at leaſt,

In this caſe it is an immeaſurable purpoſe. I can do nothing with it, and it muſt be conſidered as veſted at the death of the teſtator." The *Solicitor General*, thinking that juſtice was not done by the decree, deſired that the caſe might be further conſidered; but an agreement between the parties relating to this fund being diſcovered, and the plaintiffs ſubmitting to the opinion of the court in the decree reſted upon the agreement which provided that if any legatee ſhould die before the legacy was received, it ſhould go over; and upon that agreement the Chancellor ſaid, the relief prayed was all of courſe.

(*c*) *A.* by his will in 1786, directed that his executors ſhould ſell and diſpoſe of his eſtates, &c. three years after his deceaſe, and the reſidue of his eſtate, real or perſonal he gave to his ſiſter *E. G.* and all the children of her body lawfully begotten, to be divided by his executors among ſuch of them as might be living at the time the dividends took place, in equal ſhares. The teſtator died in 1787, leaving his ſiſter ſurviving him, who had four children then living, and none born ſince. The executors did not ſell the eſtates within the three years after the teſtator's death, but in the year 1790, the four children of *E. G.* and the huſbands of thoſe who were married, executed a letter of attorney, reciting the above clauſe in the will, and they authorized thereby *R. G.* to receive from the executors, the money which was due to them by virtue of the will. In conſequence whereof the executors, upon the application of *R. G.* ſold the eſtate in Auguſt, 1791, for 11,600l. payable by inſtallments, and the purchaſer paid a depoſit of 1160l. Various difficulties having ariſen, the conveyances were not executed, until after the ſecond inſtallment became due, which inſtallment, therefore, was not paid, and in the year 1792, prior to the execution of the conveyances, one of the daughters of *E. G.* died; and the queſtion was, whether as the daughter died before the money was divided, her repreſentative was intitled to any part of it? The ſolution of which depended upon this prior conſideration, viz. at what time the ſhares of *E. G.* and her children veſted? And it was inſiſted for the repreſentative of the deceaſed daughter, that under the authority of the laſt caſe, the eſtates were to be conſidered as ſold immediately upon the teſtator's death, and that the ſhares of *E. G.* and her children veſted at that period. And the Lord *Chancellor* ſaid, that the facts of the caſe had put the point out of all queſtion, for the joining of all in the direction *as* to the ſale, fixed their ſhares.

(*d*) *A.* bequeathed to truſtees 40l. a year, part of 566l. annuities, in truſt to pay the dividends to his couſin *S. B.* for

(*c*) Stapleton *v.* Palmer, 4 Bro. CC. 490. (*d*) Harriſon *v.* Freeman, 5 Veſ. Jun. CC. 107.

life, to her separate use; and after her death, upon trust to transfer the 40l. *per annum*, or the stock or fund, wherein the produce thereof might be invested to *P. S.* and *S. S.* children of his cousin *W. S.* in equal moities, and in case of of the death of either of them in the life-time of *S. B.* then he gave the whole thereof to the *survivor living at her decease*. The testator died in 1782. *S. S.* died in January, 1784, and *P. S.* in December in the same year, both intestate, and before the death of the testator's cousin *S. B.* *S. B.* having died in 1797, the question was whether the representative of *P. S.* and *S. S.* was intitled to the 40l. annuities, or the residuary legatees of the testator? And by the *Master of the Rolls*, "The only question upon this will is, whether by the event that has happened, the deaths of *S. S.* and *P. S.* in the life of *S. B.* this sum of 40l. *per annum*, given after her death in their favour, is undisposed of, or in other words, whether the bequest is by these means, put an end to and become absolutely void. Upon the first part of the will, if it stood without the condition annexed, in case of the death of either of them in the life-time of *S. B.* there could be no doubt, I suppose that it would have been a vested interest in those two persons, for it is a bequest of these annuities to a person during her life, and after her decease, to two given persons in equal moieties. If it rested upon these words, there could be no doubt, it would upon the death of that person have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person intitled for life or not. Then comes the condition annexed, making a disposition in a given event different from that which would have been the effect of the first words. The contingency described in that part of the will never took place; there being no survivor of those two persons at that time. The question then is, whether this makes the whole void, as if it never vested at all. It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened, in which it is declared that interest shall not arise. The case of (*e*) *Mackell* v. *Winter* is most analagous to this. I held the interest absolutely vested in the surviving grandson. My decree was reversed: the Lord *Chancellor* holding two things, in both of which I had given an opinion; first that it never did vest in the two grandsons or the survivor of them; 2dly, if it did vest, yet it sufficiently appeared upon the will, that the testator intended a survivorship to take place among all three, the grandsons and the grand-daughter, though it was not expressed. As

(*e*) *Supra*.

to the firſt point it does not bear upon this caſe. The Lord *Chancellor* was of opinion, the words were not ſufficient to give a veſted intereſt to the two grandſons for this reaſon, that nothing was given to them till 21, but the capital and the accumulation are directed to be paid to them at that time and no other. His Lordſhip's opinion is expreſſly founded upon that. My opinion reſted intirely upon the firſt point. I admit the abſurdity of the intention: but that is no reaſon why it ſhould not prevail. I am very glad the decree took the turn it did, for unqueſtionably it effected the real intention of the teſtatrix. But without entering into that queſtion, or commenting farther upon that caſe, to which it is my duty to ſubmit, it is ſufficient to ſay, that it is impoſſible, any doubt can be entertained upon the words of this will. Upon the principle of the Lord *Chancellor's* opinion, that the words in that will were not ſufficient to give any veſted intereſt till the attainment of majority, my decree undoubtedly was wrong. But upon the doctrine held both by his Lordſhip and by me, it muſt be determined, that upon the words of this will there was a veſted intereſt, that was to be diveſted only upon a given contingency, and the queſtion only is whether that contingency has happened? No words can be more clear for a veſted intereſt. Then the rule that I applied in *Mackell* v. *Winter*, and that was admitted by the Chancellor, takes place, that if there be a clear veſted intereſt, the court is only to ſee what there is to take it away, and the only contingency is that in caſe of the death of either of them in the life of *S. B.* the whole is to go to the ſurvivor. Neither of them was living at her death. That rule, therefore, that I applied in *Mackell* v. *Winter*, and that I ſtill think binding upon a court of equity, applies. There is a veſted intereſt, and the contingency upon which it is to be diveſted never happened: the veſted intereſt therefore remains as if that contingency had never been annexed to it. Upon the principles laid down by the Lord Chancellor in *Mackell* v. *Winter*, I am perfectly clear his Lordſhip would have agreed with me in this caſe. I could illuſtrate the principle by putting the caſe of a real eſtate, inſtead of theſe annuities, given after the death of the tenant for life, to theſe two perſons and their heirs as tenants in common, but if either of them died before the death of the tenant for life, then to the ſurvivor and his heirs. Putting it ſo, there is no poſſibility of doubt, it would have been a veſted intereſt in them, to be diveſted upon a contingency which did not take place. Declare that theſe annuities of 40l. *per annum* were a veſted intereſt in *S. S.* and *P. S.* and now belong to the defendants *F.* and his wife in right of the latter as their adminiſtratrix."

It may be uſeful to obſerve in this place, that although this

caſe may bear a near reſemblance to *Scurfield* v. *Howes* before ſtated (*f*) and the decrees in the two caſes may appear without accurate obſervation to be inconſiſtent: yet the two caſes are eſſentially different, ſo that the judgments in both may be right. In *Harriſon* v. *Foreman*, the ſurvivor of the children who ſhould be living at the death of the tenant for life, was alone to take: as both therefore died before the arrival of that period, the contingency upon which the prior intereſt given to the children were to be diveſted, never happened. But in *Scurfield* v. *Howes* the legacy was to go over to the ſurviving child, if either of them died in the life-time of the tenant for life, therefore the brother being the ſurvivor, though dying before the tenant for life, became intitled to the whole fund, he not being required as the ſurvivor in *Harriſon* v. *Foreman*, to be living at the death of the tenant for life. The ſame obſervations are equally applicable to *Barnes* v. *Allen* alſo ſtated above.

In the caſe of *Gaſkell* v. *Harman* lately determined at the *Rolls*, although the principle upon which the caſe of *Hutchin* v. *Mannington* (*g*) was determined, was acknowledged, yet the court conſidered ſuch principle inapplicable to the firſt caſe, and therefore ſupported the bequeſts. The caſe as reported was to the following effect, (*h*) *John Strettell*, by will, dated the 3d of March, 1786, confirming his marriage ſettlement, by a bond previous to his marriage, the condition of which he ſtated that he had performed by a deviſe of his houſe at *Croydon*, and a transfer of 11,000l. 3-per cent. conſolidated Bank Annuities, in addition gave to his wife an annuity of 395l. to be paid out of the beſt ſecurity he ſhould die poſſeſſed of, except his eſtate called *Gotwick*, and directed that ſuch ſecurity ſhould afterwards be conſidered as part of the fortune bequeathed to his ſon *Amos*, and ſhould be eſtimated at 16,000l. He gave his wife the houſe at *Croydon*, the uſe of his furniture, plate, and the choice of the furniture of one of his houſes, and made ſeveral other bequeſts in her favour, and directed, that after her deceaſe, the ſaid ſeveral particulars, or ſuch as were then exiſting, ſhould be either kept for the uſe of his ſon, or be ſold, and the produce ſhould fall into the reſidue of his perſonal eſtate according as his wife ſhould by will appoint, and for want of appointment, the ſame ſhould be ſold for the purpoſe aforeſaid. All the remainder of his goods, chattels, furniture, &c. after his wife ſhould have made ſuch choice, he directed ſhould be ſold by his executors; and that *Joſeph Brickwood* ſhould have the preference of purchaſing the leaſe of his houſe in *Riches-Court*, with the furniture. The teſtator then gave to his

(*f*) Page 191. (*g*) *Supra*. (*h*) 6 Veſ. Jun. 259.

friends *Daniel Mildred*, *John Harman*, *Alexander Forbes*, and his brother in law *Joſeph Hayling*, naming them as his executors, their heirs and aſſigns, freehold eſtates, deſcribing them, and all other his freehold eſtates; as to the houſe at *Croydon*, to the uſe of his wife for life, in part of the proviſion by her marriage ſettlement, and after her deceaſe to other uſes; and as to *Gotwick* and other premiſes, in caſe his ſon ſhould attain twenty-one, in truſt to convey to the uſe of his ſon for life *ſans* waſte, remainder to his iſſue in tail, and for want of ſuch iſſue, or in caſe there ſhould be none who ſhould attain twenty-one, remainder over, and he gave all the other eſtates to other uſes. He gave his ſon 30,000l. to be paid him when he ſhould attain twenty-one, or ſo ſoon after as he could be put into poſſeſſion thereof according to the direction after mentioned, viz. he directed that the ſeveral funds or ſecurities which ſhould be appropriated for ſecuring the aforeſaid annuity of 800l. to his wife, (made up of the intereſt and rents, provided by him in performance of his marriage ſettlement, and the additional annuity of 395l.) which altogether ſhould be conſidered of the value of 16,000l. and no more, ſhould be computed as part of the 30,000l.; the remaining 14,000l. to make up the ſame to be appropriated or ſet apart and inveſted by his executors at intereſt: the eſtate at *Gotwick* to be conſidered part of the 14,000l. and valued at 1000l.: ſuch other of his real eſtates as his executors ſhould not find it neceſſary to mortgage or ſell for the purpoſes after mentioned, to be conſidered a farther part, and be conveyed to him in fee to be valued at twenty years purchaſe upon the improved rent. He impowered his executors and truſtees to advance and pay out of his eſtate any ſum not exceeding 1500l. to be laid out in educating his ſon. He gave his ſon an annuity of 150l. purchaſed by him for the lives of himſelf and ſon, to be kept inſured upon his ſon's life, until his age of twenty-one, the ſurplus income to be applied to maintenance and education, with full power to his executors, as his ſon ſhould advance in years to make any farther allowance out of his eſtate for the purpoſe aforeſaid: and the reſidue of the income of his ſon's fortune beyond maintenance and education, to be applied in or towards payment of the ſeveral annuities after-mentioned.

The teſtator then appointed his wife ſole guardian of his ſon, until his age of twenty-one, and in caſe of her death, he appointed his executors and *Brickwood*, expreſſing particular confidence in the latter, that he would exert himſelf for his (the teſtator's) ſon's intereſt; and after reciting that he had made his will under the fulleſt conviction that his fortune would ultimately amount to the ſum of 45,000l. or upwards, he proceeded to make the following bequeſts;—

To his wife 2000l. to be at her disposal by will, the interest during her life to be applied to the other purposes of his will, empowering her to apply it, or any part during her life for the advantage of their son: to *Forbes* 100l. and several other pecuniary legacies. And he recommended to his executors, if the same could conveniently be done, to discharge all these last-mentioned legacies at one payment, without waiting for the general distribution therein after mentioned: to *Hayling* 500l. and several other legacies, some subject to conditions. The will then proceeded thus;—

"I give to my very worthy and kind friends *Daniel Mildred* and *John Harman*, two of my executors, herein-after named, the sum of 500l. each, with my most grateful acknowledgments for that last essential proof of their affection and regard.—I also give to my friend *Alexander Forbes*, one other of my executors, the sum of 400l. and to my brother-in-law *Joseph Hayling*, my other executor, 250l. but these four legacies to my said executors are not to be paid in preference to any other of the legacies herein last before-given; and I give to Mr. *John Brickwood*, who will be assisting my executors in collecting my effects and settling my affairs, the sum of 500l."

He then gave several annuities, among them 50l. a year to *Forbes*, for life; and if they found occasion for the extension of the annuities, he authorised his executors, in case the circumstances of his fortune would admit, to extend the annuities to any sum not exceeding 100l, *per annum*, and he directed his executors at the beginning of the annuities, for securing payment thereof, to invest a sufficient part of his personal estate in the funds or on mortgages at their discretion, distinguishing in their accounts the capital for each annuitant, that at their decease the same might be applied in manner therein-after directed. He then proceeded thus—

"And whereas by reason of the agreement, I have lately entered into with Mr. *John Brickwood*, and Mr. *Thomas Pattle*, junior, for their taking to themselves my debts owing in *America*, and paying me the same by instalments, to be secured by their bond or bonds, I cannot fix any period for the payment of the pecuniary legacies or annuities, herein before given, which are not already particularly directed as to time, I must leave it to the discretion of my executors to make a first dividend upon the said legacies, so soon after the receipt of the said Messrs. *Brickwood* and *Pattle*'s first payment, as they shall have sufficient to divide 5s. in the pound, or any greater sum among my said legatees, and at the same time invest or set apart for the said annuitants, a sufficient sum or sums to produce and bring in one quarter part of their annuities, and the like proportions to be continued until the whole are discharged or

provided for; my ſaid ſon's fortune in every ſuch diviſion being conſidered a creditor for 14,000l.;" and for the more ſpeedy payment of the ſaid legacies and annuities, "my ſaid executors" to mortgage or ſell all or any part of his real eſtate before deviſed, except the houſes at *Croydon* and *Gotwick*, and to cut timber and underwood upon the latter, when of ſufficient growth; the annuities to *Forbes* and ſome others, to be paid quarterly, and to commence three months after his deceaſe. He gave three other annuities payable quarterly, directing the firſt payment to be made, when his executors ſhould have ſufficient effects in their hands to inveſt one quarter part of the capital producing the ſame, and from thence to continue payable as aforeſaid, and he ſubmitted the ſettlement of accounts with his late brother to his executors, and gave directions for the adjuſtment of other accounts, and declared it was not his intention to extinguiſh debts from legatees, but ſuch debts to be paid firſt. The will then proceeded in theſe words—

"And whereas the long minority of my ſon, will moſt probably create a conſiderable addition to my fortune, and it is my earneſt wiſh and intention that my reſiduary legatees ſhall each of them receive 500l. at the leaſt, over and above their reſpective legacies, I therefore direct, that when that ſum can clearly be aſcertained to them after proviſion for payment of my ſon's fortune, and the ſeveral legacies and annuities herein before contained, then what farther ſhall be received or accumulated of my eſtate, ſhall be diſpoſed of as follows, (to wit) to my ſon *Amos*, the ſum of 2,500l. in addition to his fortune, and payable at the ſame time therewith: to the ſeveral pecuniary legatees, whoſe legacies are to be gradually diſcharged by way of dividend, as herein before is directed, the further ſum of 25 per cent. or one quarter part more upon the capitals of their reſpective legacies, and if any farther ſurplus ſhall be made or ariſe, be it more or leſs, the ſame to go and be equally divided among my reſiduary legatees, or ſuch of them as ſhall be then living: but in caſe my ſaid ſon ſhall happen to depart this life before he attains the age of 21 years, his fortune being then in the hands of my executors, I give and bequeath to my ſeveral annuitants herein-after named, the ſeveral annuities herein after mentioned, with ſuch conditions and the capital producing the ſame, to go and be applied in like manner as herein-before is mentioned and appointed reſpecting the annuities herein-before given to them."—Then after giving his wife 300l. a year, *Forbes* 100l. a year, and two other annuities, the teſtator proceeded, "but in caſe my ſaid ſon's fortune ſhall not be then all in hand, then ſuch ſmaller equally proportioned augmentation of the annuities, as the part of my ſon's fortune in hand, will admit," and after the death of his wife, and proviſion being made for his then ſurviving annuitants, he bequeathed the

money then in the hands of his executors in ninths, and after the disposition of eight-ninths, concluded thus—

"And the remaining ninth part in equal shares, to such of my residuary legatees as shall be *then living*; and as the then remaining annuitants shall from time to time depart this life, the fund for payment of their annuities, which is not herein-before specifically disposed of, shall go to and be equally divided among such of my residuary legatees as shall be living at the decease of each separate annuitant. And as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, after payment of my debts, funeral expences, and the legacies and annuities herein-before given, I give and bequeath the same, and every part thereof, equally to be divided among my good friends and executors *Daniel Mildred*, *John Harman*, *Alexander Forbes*, *Joseph Hayling*, and Mr. *John Brickwood*, herein-before named, in whose zeal respecting the assisting my executors in collecting my effects, and settling my affairs, and in whose attachment to the interest and welfare of my dear wife and child, I place the most unreserved confidence."

The testator after some farther expressions of confidence in *Brickwood*, declared, that he should not be entitled to receive any part of the residue of his estate therein-before bequeathed to him, until the bonds given to the testator by him and *Pattle*, should be fully paid, and he appointed *Mildred*, *Harman*, *Forbes*, and *Hayling*, executors, and directed, that in case of the death of any of the trustees, the survivors from time to time should appoint new trustees, and that a legacy of 250l. should be paid to each new trustee upon his appointment, and gave powers to the trustees to compound debts and submit to arbitration with the common clause of indemnity.

The testator died upon the 28th of July, 1786. *Mildred* died in *February*, 1788, *Forbes*, in October, 1790, and *Hayling* in January, 1796.—*Forbes* bequeathed all his estate and effects to his sister, whose residuary legatee and administrator with the will annexed filed the bill, claiming a fifth of the residue under *Strettell*'s will, as vested at his death, in *Forbes*.—That claim was resisted, except as to so much as was got in during the life of *Forbes*. The *Master of the Rolls* pronounced his opinion to the following effect.—"This bill claims one fifth part of the clear residue and surplus of the testator's estate. It is contended on the part of the two defendants, who are the surviving residuary legatees, that the plaintiffs are only entitled to a fifth of so much of the residue as accrued during *Forbes*'s life.—The doubt arises from the testator's having in effect made two residuary bequests. There are two questions,—1st. What was the intention? 2dly. Whether that intention can

be carried into execution: whether it is legal and practicable? From the whole frame of the will, the teſtator appears to have been ſenſible, that a conſiderable time muſt elapſe before his perſonal eſtate could be got in, and that until it was collected, which he ſeems to ſuppoſe could not be completely done until his ſon would be of age, the reſidue could not be eſtimated.—Making his will under that impreſſion, he directs a few legacies to be paid immediately, as to the reſt, the diſtribution was to be made as the property was realized, that is, as it got into the hands of his executors.—He gives his reſiduary legatees 500l. each, in addition to the pecuniary legacies he had before given them. But when he gives them the legacies of 500l. he does not name or deſcribe who they are. But they are to have 500l. a piece at any rate. Afterwards, having made a farther diſpoſition for his ſon and legatees, out of what farther ſhall be received or accumulated, he declares that if any farther ſurplus ſhall be made or ariſe, be it more or leſs, the ſame ſhould go and be equally divided amongſt his reſiduary legatees, or ſuch of them as ſhall be then living. Then he gives away his ſon's legacy in caſe of his death before the age of 21; and of that, ſubject to an additional proviſion for his annuitants, he gives one ninth part to ſuch of his reſiduary legatees as ſhall be then living.—It ſeems to have been his intention therefore, that they, that is, ſuch of them as ſhould be then living, ſhould take whatever was indefinite ſurplus.—As to that there is no doubt or ambiguity.—He intended they ſhould take only the firſt pecuniary legacies, and the legacies of 500l. a piece abſolutely. The reſt was contingent, and only veſted in them if living, when the ſurplus aroſe.—That being the intention, it is objected, that though diſtinct and explicit that intention is not practicable.—It is ſaid the ſurplus ariſes from day to day, and that ſuch a bequeſt was too vague and indefinite to be carried into execution, and for this the caſe of *Hutcheon* v. *Manning*, is cited (*i*). In that caſe there was nothing to which the receipt was to be applied, it was to be a bare poſſibility. Lord *Thurlow* ſaid, the teſtator had given no ſtandard to which the court was to apply the event on which the teſtator had given over thoſe legacies, and the claimants there came to diveſt a legacy abſolutely given.—They were to make out a caſe on which it was given over to them, it was as the Lord *Chancellor* expreſſed it, an immeaſurable purpoſe. When it might have been received it was impoſſible to determine.—Nothing could be more indefinite. That caſe therefore is clearly diſtinguiſhable, and *Stapleton* v. *Palmer*, (*k*) went off upon another point.

(*i*) *Suprà*. (*k*) *Suprà*.

Here nothing veſts in the reſiduary legatees, unleſs they are living when the exiſtence of that ſurplus in their hands is aſcertained, when it is received and accumulated.—There can be no difficulty in aſcertaining when the ſurplus is made, and it might juſt as well have ariſen on a claim of one of the pecuniary legatees, for their dividends are made payable when there is a fund collected by the executors, and if a pecuniary legatee had claimed ſuch dividends on a given day, he muſt have ſhewn that there was a fund capable of paying that dividend at the time of the claim, and there could be no difficulty in taking that account. In this caſe the account is not to be taken day by day; but all that is to be done, is to ſee how the accounts of the executors ſtand on the day of the death of any one of the deceaſed reſiduary legatees. There is nothing impracticable in that. It is as eaſily done as the account of the debt given in the caſe of *Innes* v. *Mitchell* (*l*), where a debt was given as it ſtood on a certain day. In the inſtance of the annuitants under this will, that part of the eſtate appropriated to ſecure the annuities, veſts in ſuch only of the reſiduary legatees as ſhall be living at the death of the annuitants. It is ſaid, this would make it arbitrary, as the executors might regulate their conduct in collecting the teſtator's debts upon a ſpeculation as to the ſtate of ſome among themſelves. But the whole frame of this will ſhews, that the ſtate of the teſtator's property did not admit of an immediate diſtribution, and the neceſſity of that power aroſe out of the ſituation of his affairs. Is it not to be permitted to a teſtator to poſtpone the veſting of his property till his funds ſhall be collected?—He ſuppoſes, and the court muſt ſuppoſe, till the contrary is ſhewn, that the executors act *bona fide*.—But had not the teſtator a right to ſay ſo? if the executor might by poſſibility act improperly or arbitrarily, it was the buſineſs of the teſtator to contemplate that poſſibility, and provide againſt it.—But there never was a caſe in which there was leſs temptation to executors to act improperly; for their own legacies of 500l. which were veſted abſolutely, would not be paid till the funds were collected, and they could take no ſurplus till there was a ſurplus, and it is not here alledged, that there was any unfair conduct of the executors. Then it is ſaid, the laſt reſiduary clauſe has no effect. That is not ſo; for in the firſt place it names who are the reſiduary legatees, who were not before named. Next, if they all had died, perhaps the laſt reſiduary clauſe would have given the reſidue to the repreſentatives of all of them; but two reſiduary legatees being now living to take whatever ſurplus ariſes, no ſuch queſtion as that laſt now occurs. I am, there-

(*l*) 6 Veſ. Jun. CC. 461. ſtated *infrà*.

fore of opinion, the plaintiffs are not entitled to one fifth part of the clear reſidue which has ariſen, but are entitled only to a fifth of ſo much as had ariſen, and was aſcertained at the time of *Forbes*'s death.

The word "ſurviving," has been conſidered ſynonimous with "others," in order to effectuate the intention, and in favour of veſted intereſts.

(*m*) *A.* bequeathed to his ſon *Andrew Wilmot*, one third part of his reſiduary eſtate, to be placed at intereſt, for his benefit, by the executors, with a direction that his ſon ſhould not be put into poſſeſſion of his ſhare before 25. The remaining two thirds he gave to his two daughters, *Mary* and *Sarah Wilmot*, to be placed out at intereſt in like manner, for their advantage, but they not to have poſſeſſion thereof, until 21. The teſtator then recommended his daughters to the care of his executors, and that they ſhould be educated in a manner ſuitable to the ſmall fortune they might become poſſeſſed of at the time of their marriages, which marriages he deſired might not take place before their ages of 21, their fortunes to be ſettled upon them and their heirs for ever; but in caſe of their deaths without iſſue, then to their huſbands, and if either of them died before 21, her third part was to be equally divided between the *two ſurviving* children, and in the event of the death of two of his above-named children, then the whole of what he might die poſſeſſed of ſhould devolve to the ſurviving child. But if all his children died, before they attained their ſaid reſpective ages, the whole of his eſtate was to go to his brothers *A.* and *P. Wilmot*, and their heirs, in equal ſhares. *Mary* attained 21, in 1795, and received her ſhare, and having married, died in 1796, her huſband took out adminiſtration. *Andrew*, died in 1802, having only attained 18. *Sarah*, married *P. M.* and they having obtained an order for a tranſfer and payment of her ſhare, and of a moiety of the ſhare of *Andrew*, petitioned, that the remaining moiety might be tranſferred and paid to *P. M.* with the conſent of *Sarah*, as the *only ſurviving* child at the death of *Andrew*. But the huſband of *Mary* claimed that moiety in the right of *Mary*, as ſhe attained 21, at which period the teſtator intended all the intereſt ſhould be conſidered veſted. And by Lord *Eldon*, C. "It muſt be argued, that the word *ſurviving*, means the ſame as *other*, or, *living at the age aforeſaid*. In the clauſe in which the gift over is made, it was never meant that any portion ſhould be taken. It was to be either the whole or none. There is a number of authorities for conſtruing the word *ſurviving* to mean *other*. I think they are right in contending, that this veſted."

(*m*) Wilmot v. Wilmot, 8 Veſ. Jun. CC. 10.

SECT. II.

Of Veſted Legacies payable out of real Eſtate.

IT has been noticed before, that courts of equity in their conſtruction upon the veſting of perſonal bequeſts, make a difference when the words *payable* or *paid*, are, or are not, inſerted in the manner of giving them, determining in the firſt caſe in favour of immediate veſting, and in the ſecond, againſt it. Theſe courts, however, have adopted the above diſtinction, as a mere *poſitive* rule, in compliance with the practice of the eccleſiaſtical court, which has a concurrent juriſdiction with them in theſe matters, and not from any conviction of the rationality of the rule; they have on the contrary generally expreſſed a diſapprobation of the diſtinction, in thoſe caſes in which they have been obliged to decide in conſiſtency with it. In gifts, therefore, of legacies *originally* payable out of, or *charged* upon real eſtate, as ſuch diſpoſitions are not within the eccleſiaſtical juriſdiction, courts of equity have not found themſelves obliged for conformity to adopt the ſame rule of conſtruction, but they have required the whole condition upon which the legacies were given to be complied with, viz. the attainment of the deviſee or legatee at the age of 21, &c. admitting of no exception, when the legacies are made *payable* at 21, or *at* 21, or with or without intereſt. This diſtinction, however, muſt be noticed, that when the legacies are charged both upon the real and perſonal eſtate, if the legatee die before the time of payment, the legacy will ſink into the land in all caſes where it would be held to ſink, if the fund conſiſted of real eſtate only; and it will be conſidered veſted with regard to the perſonal eſtate, in all caſes, in which the ſame would be ſo adjudged if the fund conſiſted of perſonal property only. This will be illuſtrated by the following caſes.

(*n*) *John*, Lord *Pawlett*, by leaſe and releaſe of the 7th and 8th of May, 1679, conveyed ſeveral manors and lands to truſtees and their heirs, to the uſe of himſelf for life, *ſans* waſte, remainder to other truſtees for the term of 500 years, upon the truſts therein after declared, and then limited ſeveral remainders over. The truſt of the term for 500 years, was de-

(*n*) Pawlett *v.* Pawlett, 1 Vern. 321.

clared to be for raiſing monies by rents and profits, &c. to pay Lord *Pawlett*'s debts, as alſo ſuch yearly maintenance for every younger ſon and daughter as was therein after expreſſed; and after payment of his debts, and ſuch maintenance, then to pay ſuch ſums for every younger ſon and daughter, as Lord *Pawlett* had or ſhould have, and at ſuch times and in ſuch manner, as he ſhould by writing or by his laſt will appoint; and in default of appointment, the truſtees ſhould in convenient time after ſuch debts as aforeſaid ſhould be ſatisfied, and not before, raiſe and levy out of the premiſes, 4000l. a piece for each younger ſon, and 4000l. a piece for each daughter of Lord *Pawlett*, by Lady *Suſanna*, his ſecond wife, *payable at one and twenty* or marriage, which ſhould firſt happen; and that (in caſe Lord *Pawlett* ſhould not otherwiſe direct by will) every younger ſon and daughter ſhould be allowed ſuch competent yearly maintenance and education, as ſhould be thought requiſite till the portions ſhould be reſpectively paid, ſo as ſuch maintenance did not exceed 150l. *per annum*, for a ſon, and 100l. *per annum*, for a daughter; and after the performance of theſe truſts, and ſome other truſts therein mentioned) the truſtees were to ſurrender ſo much of the 500 year's term as ſhould remain, to whom the immediate reverſion ſhould belong. Lord *Pawlett*, by his will of the 29th of May, 1679, deviſed to his two daughters by *Suſanna* his wife, 4000l. a piece for their reſpective portions, to be raiſed and paid to them reſpectively in ſuch manner as in the indenture was directed; and declared that they ſhould have the ſame yearly maintenance until their reſpective portions ſhould be raiſed as appointed by the releaſe. He alſo declared that the 4000l. a piece were all the portions that they ſhould be intitled to under the deed or will, unleſs his ſon and heir apparent ſhould happen to die without iſſue, and then they ſhould have 2000l. a piece more. Lord *Pawlett* died leaving iſſue by *Suſanna*, one ſon the defendant Lord *Pawlett*, and two daughters *Suſanna* and *Vere*. Before any part of *Vere*'s portion could be raiſed, ſhe died under age and unmarried, and adminiſtration of her eſtate was granted to her mother, who filed her bill againſt the heir and the truſtees to have the 4000l. with intereſt from the death of *Vere*, raiſed out of the truſt-eſtate. And the queſtion was, whether the plaintiff as adminiſtratrix of her deceaſed daughter, was intitled to have the 4000l. and intereſt raiſed out of the real eſtate, though ſuch daughter died under 21? And by the *Lord Keeper*, "This is a caſe both great in value and its conſequences, and I find no precedent on either ſide. The caſe of *Bond* v. *Brown*, being a new caſe, and decreed but laſt term, is not to be urged as a precedent. As to a legacy, I take the law to be ſettled, that where it is *debitum in præſenti*, though not payable till a future day, it ſhall go in a courſe of

administration, and the reason is, that it operates upon the personal estate, and depends purely on a will, which is to be construed and expounded in the spiritual court; and in such case, it is but just that the legacy should go in a course of administration, in regard it comes out of the personal estate, and it is indifferent whether the executor of the first or the last takes it. And so it is where a sum of money is by will only devised, payable out of land, because it has been looked upon as a legacy. But where it stands upon a deed only, as I take it, that it does in this case, the will being only a confirmation of the deed (and so it would have been if Lord *Pawlett* by deed had only raised a trust for payment of such portions as he by will should appoint) the case is quite of another consideration: And here the plaintiff has no title at law, neither is there any demand according to the letter of the deed, but the plaintiff would have the trustees decreed to raise a portion, which according to the letter of the deed never became payable, and would have me force a construction in favour of the plaintiff, in prejudice to the heir at law: But I see no reason to decree for the plaintiff, and the rather, for that the 4000l. is to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the will; and therefore the bill must be dismissed." The decree was affirmed on appeal to the house of Lords.

(*o*) The defendant's father had mortgaged his manors of *P.* and afterwards intailed the equity of redemption on the defendant his son; and by will, devised some leasehold and personal estate to be applied for the payment of his debts and legacies, directing that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to make good his daughter's portion, and bequeathed to his daughter 3000l. *to be paid her at* 21, or marriage, if married with consent, if not, then but 1000l. and died, leaving issue the defendant his only son, and a daughter; the daughter died when but *six* years old, to whom the mother, late the wife of the plaintiff *Yate*, took administration; and *Yate* was her executor, as also administrator *de bonis non* to the daughter, and was the plaintiff in the present suit to have the 3000l. portion. And it was insisted for him that this was not within the reason of the case of *Pawlett* and *Pawlett*, that the portion should extinguish in the land for the benefit of the heir, for there the settlement was by deed, here the portion is provided by will; there it was to be raised only out of the land; here the personal estate is liable as well as the land, and has been applied in part to pay off the mortgage which affected the land, but the court dismissed the bill, and declared it to be within the reason of Lord *Pawlett*'s case.

(*o*) Yate *v.* Phettiplace, 2 Vern. 416. Pre. Ch. 140. SC. approved of by Lord Hardwicke in Reynish *v.* Martin, *infrà*.

(*p*) *B.* had two ſons *Richard* and *Thomas*, and being ſeiſed in fee of the manor of *Blackacre* (which was in mortgage) made his will and deviſed 1000l. to *Thomas* (being then about a year old) to be paid to him when he ſhould have arrived at his age of 21, out of the manor of *Blackacre*, with a power to the executor, by felling of timber growing on the eſtate to raiſe ſuch monies as his perſonal eſtate ſhould fall ſhort of, for the payment of his debts and legacies.

Thomas died about the age of two years, and the eldeſt ſon died about the age of ſix, upon which the eſtate coming to the uncle, and the mother having adminiſtered to *Thomas* claimed the 1000l. legacy. But by Lord Commiſſioner *Jekyll* "It was determined about the latter end of Lord *Somners*'s time in the caſe of *Yate* v. *Phettiplace* (*q*), that where one by will gave a portion to a child out of a real eſtate, payable at a future time, and the child died before that time, the portion ſhould ſink; nay that it ſhould ſink as well for the benefit of an *hæres factus* as of an *hæres natus*, for the former is ſubſtituted by the teſtator in the place of the latter, and the true reaſon is, that the legacy being given as a portion, when the child dies before that portion is payable, there is no occaſion for it, and equity will not countenance the loading of an heir for the benefit of an adminiſtrator." The court therefore declared, that it was not the intention of the teſtator that the 1000l. deviſed to *Thomas* ſhould be raiſed if he died before 21, and that as *Thomas* died before that age, the legacy fell into the inheritance for the benefit of ſuch perſon as was intitled to the eſtate after payment of the teſtator's debts and legacies. It was then objected, that though this might be true as to a portion given out of a real eſtate, yet here the legacy was a charge alſo upon the perſonal eſtate, and therefore (it was ſaid) that if the real eſtate was not ſufficient for the payment of the legacy, yet the perſonal ſhould be liable, and that this was the plainer from the executor being empowered to fell timber for the payment of ſuch of the legacies as the perſonal eſtate was not ſufficient to pay. But it was anſwered by the court, that this muſt be intended ſuch of the legacies as the perſonal eſtate was liable to pay; that it was true, *were the legacy chargeable on the perſonal as well as the real eſtate, then ſo much thereof as the perſonal eſtate would extend to pay, ſhould go to the executors or adminiſtrators of the child*, but that this was a charge only upon the land.

(*r*) *C.* bequeathed 500l. to his nephew *L. D. payable* at his age of 25, and deviſed his real eſtates to truſtees and their heirs chargeable with the payment of his debts, *legacies*, &c. *L. D.*

(*p*) Jennings *v.* Lookes, 2 P. Will: 276. (*q*) *Supra*. (*r*) Duke of Chandos *v.* Talbot, 2 P. Will: 602-612.

having ſurvived the teſtator, died at the age of 16. From the ſtate of the real and perſonal aſſets, it became neceſſary for the court to determine, whether all or how much of the 500l. was to be paid, regard being had to the circumſtance of the legatee not having lived to attain his age of 25? And Lord *King*, C. ſaid, he had looked into the caſe of *Yate* v. *Phettiplace* (*s*) and alſo that of *Jennings* v. *Lookes* (*t*), both of which came fully up to the preſent caſe, viz. that where the perſonal eſtate was not ſufficient, and the real eſtate in failure thereof was made liable to anſwer the legacies, in caſe of the legatee's dying before the legacy became due, the charge upon the land determined; that it ſeemed but a very ſlight and ſuperficial diverſity, between a legacy given *at* 21, and *payable* at 21, and though it had been eſtabliſhed in the ſpiritual court, as to legacies given out of perſonal eſtate, it did not deſerve to be favoured or countenanced where the legacy is charged upon land, and the infant-legatee dies before 21, or before the time when the legacy is made payable; that there was not any the leaſt difference between a ſum of money charged by a will on land, payable to an infant at 21, and where ſuch charge ariſes by deed. That the authorities before mentioned ſhew, there is no difference where the real as well as the perſonal eſtate is charged, for in ſuch caſe, as far as the executor or adminiſtrator claims out of the latter, he ſhall ſucceed, according to the rule of that court where theſe things are determinable, even though the infant-legatee dies before the time of payment, but as far as the legacy is charged upon the land, ſo far ſhall it, on the legatee's dying before the legacy becomes payable, ſink; and this being the rule, which has of late univerſally prevailed, be the legatee a *child* or a *ſtranger*, it would be of the moſt dangerous conſequence, and diſturb a great deal of property, for him to break into it. He thought, therefore, that ſo much of the legacy of 500l. made payable to *L. D.* at his age of 25, as was to affect the real eſtate, muſt fail, as *L. D.* died before that period.

(*u*) *D.* deviſed all his real eſtate to truſtees, in truſt to ſell his lands lying at *M.* and *P.* and out of the purchaſe money, to pay his debts as far as the ſame would go; and he declared that his truſtees ſhould ſtand ſeiſed of the reſt of his lands in truſt to receive the rents, &c. and to make leaſes for 99 years, determinable upon three lives, and therewith to pay all the teſtator's debts and legacies, and then to ſtand ſeiſed to the uſe of his ſiſter *I. A.* for life, remainder to the iſſue-male and female of her body, remainder over, &c. and made the truſtees executors. He alſo gave 500l. to his nephew *T. P. to be paid at his*

(*s*) *Supra.* (*t*) *Supra.* (*u*) Prowſe v. Abingdon, 1 Atk. 482.

age of 21 or matriage. *T. P.* died under age and unmarried: The personal estate of the testator was about the value of 700l. and the estates at *M.* and *P.* were insufficient to pay his debts: The bill was filed by the administrator of *T. P.* against the defendant (who claimed the lands under *I. A.* subject to the payment of the testator's debts and legacies) to have the 500l: raised under a supposition that *T. P.* took a vested interest in the legacy, transmissible to his representative, though he the legatee died before the arrival of the time of payment; and it was among other things contended for the plaintiff, that if he could not affect the real estate with the payment of the legacy, in consequence of the legatee's death before the day of payment, yet as it appeared that there were sufficient personal assets left in specie to satisfy this legacy, and as the creditors and other legatees had an undoubted right to take their remedy against the land for satisfaction of their debts and legacies, the court would so marshall the assets as to render every part of the will effectual: but Lord *Hardwicke*, Chancellor, said, that the only inducement he had to suffer so long a debate by the bar, was in order to receive satisfaction as to the point which had been insisted on in relation to the legacy being chargeable on a *mixed* fund, consisting of real and personal estate. That was a difficulty which always struck him, and it was something very extraordinary, that the real estate which was only an *auxilary* fund to the personal, should, in cases of this kind, be chargeable in a different manner, and not be made liable to the same rules and determinations with the *primary* security the personal estate, but he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge both on the real and personal estate, that he could not at that time of day, think of determining in a different manner. It was very clear, that charges on land, payable at a future day could not be raised, if the party died before the payment, and that there was no difference, whether that charge was created by deed or will, nor whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others, and this was the case in the *Duke of Chandos* v. *Talbot* and *Jennings* v. *Lookes* (*x*) in which he was counsel, for in neither of them, the provision was made by a parent. As to what was said, that the assets might be so marshalled, as for the plaintiff to receive complete satisfaction out of the personal estate, though the executors were not before the court, and so impossible to make any decree on that point, yet if it were thought material, he would retain the bill, with liberty to make the executors parties: but he conceived that point could

(*x*) *Supra.*

by no means be maintained, for the rule of marshalling assets in the manner before mentioned would hold only, where it was proper to be done *at the time the legacy first took place*, and not where it was owing to a fact, which happened *subsequent to the death of the testator*, and to a mere accident, as the death of the legatee before 21. I have often heard it alledged, said his Lordship "that the reason why legacies, &c. charged upon land, payable at a future day shall not be raised, if the legatee die before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the heir is a favourite of a court of equity, and ought to have the preference of the representative of a legatee, and likewise that the court will go as far as they can in keeping the real estate intire, and as free from incumbrances as possible. But I think the court has never gone upon such reason, but the true reason I take to be this, that the court will govern themselves as far as is consistent with equity, by the rules of the common law. In the case of personal estate, the rule is the same here as in the civil law, that there may be an uniformity of judgments in the different courts: But in the case of lands, the rule of the common law has always been adhered to: as suppose a person should covenant to pay money to another at a future day, if the covenantee die before the day of payment, the money is not due to his representative. The same rule holds, in the case of a promise to pay money, &c." The bill dismissed.

(y) *E.* devised "to *Godfrey Clark*, his heirs, executors and administrators, all that her messuage or tenement in Great Lincoln's Inn Fields, with all her furniture, (pictures excepted) household stuff, and all her real and personal estate not otherwise disposed of, as also all her mortgages, stocks in the bank, or any other company, and the residue of her personal estate not otherwise disposed of, to the said *Godfrey Clark*, in trust for the purposes herein after mentioned, viz. *to the intent that out of the said real and personal estates so devised, her several legatees might be paid*;" viz. to *Thomas Lewis* she gave 2000l. in trust for his daughter *Mary Lewis*, with a direction that he should, until *Mary Lewis* should attain the age of eighteen, or be married, place out the 2000l. at interest upon good security, to be approved of by the testator's sister, *Jane Beacher*; and also should from time to time put out at interest, the interest of the said sum, as the same should arise to a fit sum for that purpose, which 2000l. and interest the testatrix directed *Thomas Lewis* to pay to *Mary Lewis* for her own use and benefit, upon her attaining her age of eighteen, or marriage, and

(y) Van *v.* Clark, 1 Atk. 510.

appointed *Godfrey Clark* executor and reſiduary legatee. She likewiſe directed the 2000l. to be paid to *Thomas Lewis* the truſtee, *within one year and a half* after her death. *Thomas Lewis* died in the life-time of the teſtatrix; *Mary Lewis* died about half a year after the teſtatrix, unmarried. The bill was filed by the plaintiff, as repreſentative of *Mary Lewis*, to have the 2000l. paid to him. And by Lord *Hardwicke*, Chancellor, "the infant dying before the time of payment to the truſtee, I am of opinion makes this legacy not raiſable for the benefit of the plaintiff her repreſentative. If a legacy is given out of a perſonal eſtate *payable* at a certain time; or if given *at* a certain time, and intereſt in the mean time, it is a veſted legacy; but the rule of this court as to legacies out of real eſtates is otherwiſe, for if given *at* a certain time, or *payable* at a certain time, yet if the legatee dies before the time is come, it ſinks into the inheritance; ſo when a legacy is given out of a mixed fund of real and perſonal eſtate at a certain time, or to be paid at a certain time, the conſtruction is the ſame as if given out of a real eſtate only. There is but a ſlight difference between the caſes of legacies given *at* a day, or *payable* at a day, but the diſtinction is adhered to only to give a conſentaneous juriſdiction with the eccleſiaſtical courts; nor is there any caſe that I know of, to warrant a diſtinction between legacies given out of a mixed fund of real and perſonal eſtate, and out of real eſtate only (*z*). If the infant had ſurvived the year and half, for the death of the truſtee makes no diſtinction, it would have been extremely clear ſhe would have been intitled to the legacy, or if ſhe had died *after the time aforeſaid*, and before 18 or marriage, her repreſentatives would have been intitled: but if this had been merely perſonal, as ſhe died within the year and half, her repreſentative could not have been intitled for the whole gift is in the direction of the payment, which makes that the ſubſtance. In the preſent caſe, it is not a legacy merely out of perſonal eſtate, but out of both funds, and the *real charged in the firſt place* by the teſtator's expreſs directions, viz. her eſtate in Great Lincoln's Inn Fields. And this conſtruction is more agreeable to the intention of the teſtatrix, as the ſum was intended clearly as a portion for *Mary Lewis*; and the court always goes as far as it poſſibly can to hinder the raiſing portions out of land for the benefit of repreſentatives, and the end of this bill is plainly for this purpoſe." Bill diſmiſſed.

(*a*) In *Gawler* v. *Standewicke*, at the Rolls, 15th November, 1787, legacies were given to infants out of land (charged generally with debts) payable at 21, with *intereſt* at 3 per cent. One of the infants dying before that age Sir *Lloyd Ken-*

(*z*) Jennings *v.* Lookes, and the Duke of Chandos *v.* Talbot, *ſupra*.
(*a*) 1 Bro: CC. 106. in a note to Green *v.* Rigot.

ſon, after great conſideration, decreed that the legacy of the deceaſed child was not to be raiſed.

(*b*) *G.* bequeathed 5000l. to his natural daughter, *E. H.* and 3000l. to his unborn child, to be paid them when they ſhould reſpectively attain the age of 21, unleſs on account of their miſconduct his truſtees ſhould think fit to poſtpone the payment till they ſhould reſpectively attain the age of 24; which legacies he directed ſhould be *collected and raiſed* in the manner and by the means *thereinafter pointed out* and explained. He then directed his executors after ſatisfying all debts and legacies, to lodge and veſt the remainder of his perſonal eſtate in bank-ſtock, and deſired them to purchaſe a certain eſtate formerly belonging to his family, if the ſame could be purchaſed, and if it could not, to purchaſe ſome other freehold eſtate, and he deviſed the ſame when purchaſed to his natural ſon *T. N.* in tail male, with remainder to the heirs male of *E. H.* He then directed the ſum of 225l. *per annum*, to be applied out of the rents and profits of his ſaid eſtate, for the maintenance of his ſaid children, and ordered his executors to apply the *reſidue and remainder of the rents and profits of the ſaid eſtate to the purpoſe of raiſing and providing the legacies thereby given* to his ſaid natural children; and *if the ſaid rents and profits proved inſufficient*, then *he made the eſtate* ſo to be purchaſed, *chargeable* with the payment of the ſame or the remainder thereof. The child who was unborn when the teſtator made his will, died an infant, to whom adminiſtration was obtained by authority of a ſign manual; and the queſtion was, whether the adminiſtrator was intitled to the 3000l. as the legatee died before the time of payment? And by Lord *Thurlow*, C. "I thought at firſt, it was a mere perſonal legacy, but I doubt upon the whole, whether it muſt not be conſidered as charged on the land. The teſtator having referred to the manner in which it is to be raiſed, and afterwards having provided for the payment of it by charging his real eſtate. The moment the money ought to be laid out in land, it muſt be conſidered as a real fund, and therefore within the common rule."

Such is the general rule in regard to the veſting of legacies, primarily given out of, or ſecondarily made charges upon real eſtate; but courts of equity have allowed and eſtabliſhed exceptions to it in particular inſtances, as when the condition annexed to the legacy had reſpect to the circumſtances of the eſtate and not to the perſon of the legatee, they having conſidered that a benefit was at all events intended for the legatee, and that the time of payment alone was poſtponed with a view to the conveniency of the eſtate. Accordingly if lands were

(*b*) Harriſon *v.* Naylor, 3 Bro. CC. 108.

deviſed to *A.* for life, with remainder to *B.* charged with a legacy to *C.* upon the death of *A.*; in this and in ſimilar caſes, although *C.* happened to die in *A.*'s life, yet *C.*'s repreſentative would be intitled to the legacy as it became a veſted intereſt in *C.* upon the teſtator's death, the time of payment only being deferred for the benefit of *A.* until *B.* came into poſſeſſion. It will appear from the authorities ſtated below, that in determining caſes according to this diſtinction, the court of chancery has in ſeveral of them laid particular ſtreſs, when the charge of the legacies upon the land was not *equitable* merely, but *legal*, and would have enabled the repreſentatives of the legatee, who died before the time of payment, to recover the money in a court of law.

(*c*) *A.* made the following diſpoſition by will, "I give and bequeath unto my daughter *Mary* at her age of 21 or day of marriage, the ſum of 2500l. and my will is, that if my ſon *Charles ſhould die without iſſue-male of his body then living, or which may afterwards be born*, that then my ſaid daughter ſhould have and receive at her age of 21, or day of marriage, the farther ſum of 3500l. *but in caſe of the contingency of my ſaid ſon's dying may not happen before the ſaid age of my daughter or her day of marriage, that then ſhe ſhall receive and be paid the ſum of* 3500l. *whenever it might after happen.*" *A.* then deviſed his real eſtate to his ſon in tail, and for want of ſuch iſſue, remainder to his brother in fee. He then proceeded "and my will and meaning is, that the lands and premiſes hereby deviſed ſhall be liable to, and chargeable with the payment of the ſaid ſum of 3500l. whenever it ſhall become due and payable;" and directed that in caſe of failure of iſſue of his ſon, his daughter, her heirs or aſſigns, ſhould join in a ſurrender of ſome copyhold lands to the uſe of his brother, otherwiſe the legacy of 3500l. to be void. The daughter having attained 21 married, and died in the life of her brother. The plaintiff, her huſband, obtained adminiſtration, and then her brother died without iſſue-male. The queſtion was, whether the legacy of 3500l. ſhould be raiſed out of the land, the perſonal eſtate being deficient? Which depended upon this, whether ſuch an intereſt in it veſted in the daughter as to be tranſmiſſible to her adminiſtrator? And Lord *Talbot*, C. "The great queſtion is, whether this ſum of 3500l. be now a ſubſiſting charge upon the real eſtate? for the perſonal eſtate being deficient, I ſhall conſider it principally as a charge upon the land. Three things were by the will neceſſary to happen to intitle the plaintiff's wife to this legacy: death of her brother without iſſue-male, marriage,

(*c*) King *v.* Withers, Forreſt. 117. See Lord Hardwicke's obſervations upon this caſe in Sherman *v.* Collins, *infrà*.

or her attaining her age of 21. All three have happened: and now the question is, whether another implied contingency be necessary to intitle her to this additional portion. The words whereby the particular contingency of her marriage, or attaining her age of 21 is provided for, have been construed both ways; but I do not think that any great stress can be laid upon them either one way or the other. The testator might throw it in naturally enough to manifest his intent that his daughter should have this 3500l. although she married or attained her full age before her brother's death: nor will the operation of the words whereby the real estate is made chargeable, any way affect the present question. The other clause whereby she or her heirs are to join in a surrender of the copyhold lands has also been considered as influencing this question, but it does not follow from thence, that what has since happened was then in the testator's view; for she might have died before she had actually received the money, although the son had died without issue in her life, and therefore it was reasonable enough to secure the remainder-man the better by compelling her heirs and assigns to join, upon pain of forfeiture of this sum: the only thing therefore to be considered is her death, upon which the whole must turn. It has been said that where portions in cases of this nature are chargeable upon land, they shall sink for the benefit of the heir. The leading case is, that of *Pawlett* v. *Pawlett* (*d*). This and the like cases have gone not upon any provision of the party, but upon the construction of this court; nor has the difference between the age being annexed to the body of the devise itself, or to the time of payment ever held in these cases: the reason is, that if portions are given to be paid at eighteen or marriage, and the party dies before that time, the occasion of raising it, viz. the advancement ceases; and therefore the reason of giving it shall qualify the grant itself: as an annuity *pro consilio impenso et impendendo*, the counsel is the foundation of the grant: and so in these cases the provision for advancement being the reason of the portion, when that fails, the portion shall cease likewise. It may be compared to what is called in *Scotland*, *causa data et non secuta*, when the cause ceases: it shall never be raised for one purpose when designed for another. Indeed in the case of *Jackson* v. *Farrand*, 2 Vern. 424. the court went somewhat farther; but the marriage of the child might be the cause of that decree; 500l. being intended as a portion, although no express provision made that it should be paid upon the daughter's marriage. The case of *Carter* v. *Bletsoe* (*e*) seems to be contrary; and in both these cases there was the same circumstance, viz. the death of the daughter after marriage, but before the

(*d*) *Supra*. (*e*) 2 Vern. 617.

only time which was limited for the payment happened. In cases where the portion is to be raised out of the reversionary term after the tenant for life's death, and to be paid at 21 or marriage, the child marries and then dies, it would be very hard to decree it to merge. In *Butler* and *Duncomb*'s case, 2 Vern. 760. a sum was borrowed by the direction of the court to assist the husband in his trade, the term being not yet come into possession. In the case of *Broome* v. *Berkley* Eq. Ca. Abr. 340. Lord *Trevor* delivered his opinion in the *House of Lords*, that in all such cases as this, where the portion is contingent, and the child marries and then dies, the representative shall have it. Indeed in cases where the child dies so young that the portion could never be wanted, the court will not decree it to be raised, because there is no occasion for it; but there is no precedent where the court has dealt so hardly with a child who dies after marriage, as to take that away which was intended for its provision. It has been said that this being future, could not be intended as a provision for her. But is not a future interest an interest still, though not so good as an interest in possession? It is and may be a consideration of marriage. It does not indeed absolutely vest because the contingency may never arise: but it is carrying it too far to say, that it does not vest at all. Why may it not vest in such manner as to be transmissible? There is no doubt but after 21 she might have released it, though not have assigned it at law, because but a mere possibility in the eye of the law. A condition may descend upon the heir, although no estate does actually descend from the ancestor; and when the condition is performed, he shall be in by descent, because of the condition descending. And as this might have been released, I do not see why it should not be transmissible to the representative. But if I had any doubt about that, the several authorities which have been cited for the plaintiff would bind me, and particularly 2 Ventr. 347. (where the interest was as contingent as it is here) is an express authority that a contingent interest is transmissible to the representative. The case of *Bulkley* v. *Stanlake* is the same. It has been said indeed, that in this case the contingency was annexed not to the legacy itself, but to the fund only out of which it was to arise: but I apprehend that the contingency went to the whole. Nor can I help considering that case as another authority, that a contingent interest is transmissible to the representative. That of *Pinbury* v. *Elkin* (*f*) was a devise of 80l. to his brother, if his wife should die without issue by the testator then living; the devisee died in the life of the wife,

(*f*) *Supra*.

then the contingency happened and the legacy agreed to be paid to the repreſentative. The caſe of *Smell* v. *Dee* (*g*), weighs but little with me, for firſt, I do not think it well reported. Secondly, the reaſon ſeems idle, for why may not an uncertainty be tranſmiſſible as well as a certainty, though perhaps not ſo beneficial. This although to be raiſed out of land, cannot receive a different conſtruction from the other caſes; for though it is to be raiſed out of land, it remains money ſtill; and can any one ſay, that the contingency upon which this was left to her has not happened? Has not ſhe married? And although ſhe has not lived to receive it, yet the contingency having happened, it muſt go to her huſband, who is her repreſentative, and who may well be thought to have married her in contemplation of this additional fortune of 3500l. though depending upon a contingency." Decree in favour of the huſband, which was affirmed in the houſe of lords.

(*h*) *B.* deviſed all his real and perſonal eſtate to *Thomas Beal* for life, and afterwards to his children, and for want of ſuch iſſue, to his ſiſter *Martha* for life, and after her death to *John Beal* for life, and then to his children, and for want of ſuch iſſue, part of his real eſtate called *Monks* to *W.* and his heirs, the other part called *Marſh* to the defendant *Foy* and his heirs, paying out of it when it falls 500l. viz. 100l. to *S. D.* 150l. to *W.* and *O.* 100l. to *N.* and 50l. a-piece to *Elizabeth*, *Mary*, and *Margaret*, the three daughters of his ſiſter. The teſtator died 1732; *John Beal* died without iſſue, and his ſiſter *Martha* died in his life. *Margaret* one of the three daughters married *J. Gover*, and died in 1734. *Thomas Beal* died without iſſue in 1736, by which event *Foy* came into poſſeſſion of the eſtate deviſed to him in fee. *Gover* having obtained adminiſtration to his wife, aſſigned to the plaintiff the 50l. legacy, and the queſtion was whether *Margaret* notwithſtanding her death before *Thomas Beal* took ſuch a veſted intereſt in the legacy as to tranſmit the right to receive it to her repreſentative? The court determined that *Margaret* took ſuch a veſted intereſt and and that *Foy* was compellable in equity to pay the 50l. to the plaintiff for the following reaſons;—Firſt, becauſe the remainder veſted immediately by the death of the teſtator, for *Foy* might ſell or deviſe it, conſequently the 50l. was veſted in thoſe to whom it was payable, for if he had ſold it, it muſt have been ſubject to the charge laid upon it by the teſtator. Secondly, becauſe the eſtate, and the charge upon it paſſed together, ſo that the deviſee took it *cum onere*; for as it was the teſtator's intention that *Foy* ſhould have the eſtate, it was

(*g*) *Supra.* (*h*) Hutchins v. Foy, Com. Rep. 716—723.

as much his intent, that he ſhould pay the money out of it when he had it, and that the word *paying* ſtrongly ſhewed the teſtator's intent was, that *Foy* ſhould not have it, unleſs he paid the money. That neither the remainder was limited upon a contingency, nor the legacy of 50l. payable to *Margaret* upon any contingency, but the remainder veſted immediately upon the death of the teſtator, and conſequently the 50l. was payable out of the profits of that eſtate as ſoon as it came in poſſeſſion.

(*i*) *D.* by his will made the following diſpoſition, "I give and bequeath unto my daughters *Iſabella Condon* and *Diana Condon* 500l. a-piece, to be raiſed and paid to them and each of them immediately after my death, out of the rents, iſſues, and profits of my lands and tenements in *W. N.* and *B.* in the county of *York*, or by ſale or mortgage of the ſame, or a competent part thereof together, with intereſt for the ſaid reſpective ſums after the rate of 6l. *per cent. per ann.* from the time of my deceaſe until the ſeveral reſpective ſums of 500l. ſhould be duly paid to my ſaid daughters, *or their reſpective executors, adminiſtrators or aſſigns. Item,* I give and bequeath unto each of my ſaid daughters the ſum of 1000l. to be raiſed and paid to them ſeverally and reſpectively *immediately after the deceaſe of my wife*, out of the rents, iſſues and profits of my manors lands, tenements, and hereditaments in *W.* in the ſaid county of *York*, or by ſale or mortgage, &c. together with intereſt for the ſaid ſeveral ſums of 1000l. after the rate aforeſaid, from the deceaſe of my ſaid wife, until the ſaid ſums ſhall be duly paid to my ſaid daughters, *or their reſpective executors adminiſtrators or aſſigns*; and my further will is, that in caſe either of my ſaid daughters ſhall depart this life before me, then the ſurvivor of my ſaid daughters, her executors, adminiſtrators and aſſigns, ſhall have and receive all and every the ſum and ſums of money herein by me before deviſed out of my ſaid lands, to be raiſed in the manner herein before appointed, *and in ſuch caſe the part of the daughter ſo dying ſhall not ceaſe or ſink into the eſtate for the benefit of my heir, but ſhall remain and be raiſed for the benefit of my ſurviving daughter.* He gave the reſidue of his real and perſonal eſtate to his daughters, and appointed them executors. The teſtator at his death left one ſon *Thomas*, and two daughters *Diana* and *Iſabella*. *Diana* intermarried with Sir *William Lowther*, and died in the year 1736. *Ann* the mother died in the following year. Sir *William Lowther* inſtituted the ſuit to have the 1000l. given to his late wife, raiſed out of the eſtate charged with it, and his claim

(*i*) Lowther *v.* Condon, 2 Atk. 117.

depended upon this, whether *Diana*, notwithstanding her death before her mother, took such an interest in the 1000l. as was transmissible to her representative? And Lord *Hardwicke*, C. said his opinion was, that the 1000l. ought to be raised: he owned it was very true, that there was an established and fixed distinction between legacies charged upon the personal estate, and legacies charged upon the real, and that though this would have been a vested legacy, if it had been chargeable upon the personal, yet it was not so clear a case as it was chargeable upon the real estate: but still there was sufficient ground to say, in the present case, that the legacy was vested, and the plaintiff intitled to it. His Lordship then said, "The words of the will are in this manner, 'I give and bequeath to each of my daughters the sum of 1000l. to be raised and to be paid unto them severally and respectively, immediately after the decease of my wife.' So that it is a gift immediate to the daughters, though not indeed to be raised till after the death of the testator's wife: the time mentioned in the will is not annexed to the substance of the legacy, but to the payment of it, and consequently if this had been a legacy chargeable upon the personal estate, it would have been clearly a vested one, and the plaintiff intitled to it, but this is chargeable upon the real; it must be owned, that it is equally an established rule, that where a legacy is given of this sort, though the time mentioned in the will is annexed to the payment of it, and not to the body and substance of the legacy, yet in general such legacies shall not be raised, where the legatee dies before the time of payment, and this is so, more especially where a legacy of that sort is given by way of portion: but notwithstanding this is the general rule, yet the principal ingredient which has given rise to this doctrine has been, that the postponing the payment of the legacy has appeared to have arisen from circumstances on the part of the legatee, as her attaining the age of 21 or marriage; there if the legatee had died before the time of payment of the legacy, this court which favours the real estate, have considered it in this light, that there is no occasion it should be raised, the party dying, who was in the immediate contemplation of the testator; but where the postponing the time of payment of a legacy has been owing to the *circumstance* of the testator's *estate*, and not to the *circumstances* of the *legatee*, that is not so strong a case to favour the legacies sinking into the estate, as the other is; though I do not know but that the cases have gone so far as even there in some instances to allow of their sinking into the estate: it has been determined that where a legacy charged upon land depends upon two contingencies, and one of them doth not

happen, the legacy ſhall be raiſed; the caſe of *King* and *Withers*, *(k)*. However, in the preſent caſe, it is clear upon the penning of the will, that the intention of the teſtator was, that the legacy in queſtion ſhould be raiſed in favour of the plaintiff; here 1000l. is given to each of the daughters, with intereſt to be computed from the death of the teſtator's wife; no argument can be drawn from the circumſtances relating to the intereſt, for it was natural to give a direction about that in the manner it has been done; but then the will goes on and directs that this legacy ſhall be paid to the daughters, *or to their reſpective executors, adminiſtrators and aſſigns:* and ſomething may be inferred from thence in favour of the plaintiff. It has been ſaid, that the uſe of this clauſe might be only to ſhew the teſtator's intention, that if the daughters ſurvived the mother, and afterwards died, the legacies ſhould be paid to their repreſentatives; but if that was the meaning of the teſtator, the inſerting the clauſe was very unneceſſary; for if the daughters ſurvived the mother, there could be no doubt but that the repreſentatives of them would be intitled to the legacy of courſe. The uſe of this clauſe ſeems rather to ſhew the teſtator's intention, that if the daughters died in the life-time of their mother, and after the teſtator's death, that the legacies ſhould be paid to their repreſentatives. But I do not reſt my opinion upon this clauſe in the will; the clauſe that I found myſelf principally upon, is the following: 'and my further will is, that in caſe either of my ſaid daughters ſhall depart this life before me, then the ſurvivor of my ſaid daughters, her executors, adminiſtrators and aſſigns, ſhall have and receive all and every the ſum and ſums of money herein before by me deviſed out of my ſaid lands, to be raiſed in the manner herein before appointed, and in ſuch caſe the part of the daughter ſo dying ſhall not ceaſe or ſink into the eſtate for the benefit of my heir, but ſhall remain and be raiſed for the benefit of my daughters.' It has been ſaid that the contingency upon which this clauſe of the will was to take effect has not happened, but it is plain that the teſtator had in his view a certain caſe wherein the legacy ſhould not ſink into the eſtate: *that caſe was* the event of either of the daughters dying in the life-time of the teſtator. And if even in that caſe the teſtator deſigned that the legacy ſhould not ſink into the eſtate, a much ſtronger reaſon is there to infer, that he did not deſign it ſhould when the daughters ſurvived him. This clauſe is a plain indication of the teſtator's deſign, that the daughters ſhould have this legacy at all events, and that it ſhould not depend upon the accident of their dying in the life-time of their

(k) Supra.

mother: it has been ſaid, that if the teſtator had been aſked at the time of making his will, whether in ſuch an event, as has happened, he would have the 1000l. legacy raiſed for the plaintiff, he certainly would have anſwered, that he would not. But ſuch manner of arguing by aſking a queſtion of this ſort is a very uncertain one; thoſe who make the queſtion anſwer it themſelves, and give ſuch an anſwer as ſeems for their purpoſe. If however this queſtion had in reality been aſked the teſtator, I ſhould have thought it much more probable, that under the circumſtances of the preſent caſe, the teſtator would have anſwered, that his meaning was, that the plaintiff ſhould have this legacy. The plaintiff married this lady in 1719. She did not die till the year 1736, and it would be a reaſonable thing in itſelf, that under ſuch circumſtances, the teſtator ſhould intend that the plaintiff ſhould have this legacy." His Lordſhip, therefore, decreed the 1000l. to be raiſed for the plaintiff, out of the eſtate charged with it." This caſe was afterwards reheard by Lord *Hardwicke*, when his Lordſhip affirmed his former decree.

(l) *E.* by his will, reciting that he had ſurrendered all his copyhold lands to the uſe of his will, gave and deviſed the ſaid lands to his wife *Elizabeth* for life, and after her deceaſe to his ſon *Stephen*, till his grandſon *Thomas* attained the age of 23, and no longer, and ſo ſoon as his grandſon attained that age, then he gave them to his ſaid grandſon and his heirs "*on this condition*, that the ſaid grandſon, his heirs, or aſſigns, ſhould pay or cauſe to be paid unto his grand-daughter *E. Hancock*, the ſum of 60l. within two years after his ſaid grandſon attained his age of 23; and if his ſaid grandſon ſhould happen to die without iſſue of his body, then he gave and deviſed the ſame to his ſon *Stephen Hancock*, and his heirs *on condition* of paying the ſum of 100l. to *E. Hancock*, within one year after his ſon enjoyed the ſaid premiſes, by virtue of this laſt deviſe." And his will farther was, that if his ſaid grandſon or ſon ſhould make default in payment of the ſaid ſum of 60l. then it ſhould be lawful for his ſaid grand-daughter *E. Hancock*, *her executors and adminiſtrators* to enter into the ſaid premiſes, and the rents thereof to receive and take till the 60l. ſhould be paid. The teſtator died ſoon after making his will, and his ſon *Stephen* proved it. *E. Hancock* married the plaintiff, and lived till after her brother *Thomas* attained his age of 23, but died before the two years were expired, after his attaining that age. Queſtion, whether her huſband and repreſentative was intitled to this legacy? And by Lord *Hardwicke*, C. "All theſe caſes depend upon circumſtances; the preſent is a

(l) Emes *v.* Hancock, 2 Atk. 507.

particular kind of caſe, and differs from all the others. The court has often in theſe caſes laid a good deal of weight upon a child's dying before marriage, and before the portion is wanted, but here *E. Hancock* was married ſome years before ſhe died. What is the operation and effect of the deviſe in point of law? I take it to be a conditional limitation, and therefore whatever right *Elizabeth* gained thereby, is a legal eſtate. She need not have reſorted here, on the common ſuggeſtion, that as none but an heir at law can take advantage of a condition broken, that ſhe is without remedy at law; for upon default of payment, it is ſpecially provided for by the will, that ſhe, her executors and adminiſtrators, ſhall have a power of entering and holding till ſatisfied. Becauſe *Elizabeth* died within the two years, is it either a breach of the condition, or an excuſe for not paying the 60l.? It is ſaid, the condition is become impoſſible: but I am of opinion that it is not, for in point of law the condition ſubſiſts, notwithſtanding ſhe died within the two years. Suppoſe a bond given to *A.* payable at a future time, without naming his executors, adminiſtrators or aſſigns; if *A.* die before that time, his executors, though not named, would be intitled to ſue upon the bond. If the huſband then, as adminiſtrator in this caſe could recover it, even at law has it been ever held, that becauſe he has a legal remedy, equity, therefore, will not give it him, but ought to adhere to its ſtrict rules, and leave him to law: conſider what confuſion this would make; for even after the adminiſtrator has recovered a judgment at law, the defendant would have a right to come into this court, upon payment of the 60l. for a redemption, and this would occaſion a circuity, and two ſuits inſtead of one, an inconvenience which this court always avoids. The teſtator's appointing two years after his grandſon attained 23, for raiſing the 60l. ſeems to be done merely *for the convenience of the eſtate.* The caſe of *Tournay* v. *Tournay*, Pre. Ch. 290, comes the neareſt to this, but there the child for whom the proviſion was made, died very young, at five or ſix years of age, ſo that the portion not being wanted, the court exerciſed a diſcretionary power, and would not raiſe it. Here is a further circumſtance, for the will ſays, 'If my ſaid grandſon ſhould die,' &c. Suppoſe *Thomas Hancock* had died within the two years, (for if he had died after, *Elizabeth* would have been entitled to the 60l. only,) and the money had not been paid; and he had left a ſon, and the ſon had likewiſe died within the two years; and then *Elizabeth* had died before the year was out, which the teſtator had allowed to *Stephen Hancock* for payment of the 100l. would not the plaintiff, as repreſentative of *Elizabeth* been intitled to the 1000l.? Moſt certainly he would, and the

case of *King* v. *Withers* (*m*), is for this purpose directly in point, and from hence may be argued, that the intention of the testator was, that his grand-daughter *Elizabeth* should have one or the other. Upon the whole I see no equity at all for taking the portion from *Elizabeth*, or sending her representative to law, and therefore I shall decree the 60l. to be raised out of the copyhold land, and paid to the plaintiff accordingly."

(*n*) *E.* bequeathed unto each of his two daughters *Ann* and *Mary Collins* 300l. to be paid to them by his executor *John Collins*, when he should attain his age of twenty-six; "but in regard my two daughters are already provided for by lands settled on them by me, and my late wife, and by legacies left them by their grand-father, and which I have paid unto them; it is my intention that they shall not be intitled to any interest, for the said sums to them given by me as aforesaid, before the same shall become payable as aforesaid; however, for the better securing the said several sums of three hundred pounds given to my two daughters, my will is, that my two closes in *Sutton* shall stand respectively charged with my personal estate, and be liable to the payment of the said several sums of three hundred pounds to my two daughters at the time above mentioned, with a *power to enter and hold* till payment of principal and interest, from the time it shall become due," and after payment thereof, he devised the premises to his son *John Collins* in fee, whom he made executor and residuary legatee. Both the daughters arrived at their age of twenty-one, but died before *John Collins* attained twenty-six; one of them married, and left two children, the other died unmarried, but by will gave the three hundred pounds to her sister. The husband, and the two children filed the bill for the legacies. And Lord *Hardwicke*, C. "This is a legacy in the first place on personal estate, and if deficient, a right of entry is given upon real estate, and to hold till satisfied. The reasons I shall go upon are partly reasons founded on the rules of this court. First, That this is a legacy given to two daughters generally, *to be paid* when his son *John Collins* shall attain his age of twenty-six. With regard to the personal estate it is not disputed at the bar, but the plaintiffs are intitled; it is true, it has been determined, where there is a *mixed* fund of real and personal, that notwithstanding it is considered as a vested legacy as to the personal estate, yet otherwise as to the auxiliary fund, and shall not be raised out of the real estate, where the legatee dies before the time of payment. Even this was a case of pretty hard digestion when first determined; because, if the duty itself was due, where the land was given as a security, it seemed a little harsh

(*m*) *Supra.* (*n*) Sherman v. Collins, 3 Atk. 319.

that the land ſhould not be commenſurate to the ſecurity. But to prevent bringing unneceſſary burthens upon heirs, the court was prevailed upon to determine it ſo, and it is now ſettled that it ſhould follow the rule of portions and legacies chargeable on real eſtate and ſink in the land. Which brings it to the queſtion, what would be the conſequence if theſe legacies had been originally chargeable on real eſtate? 'But in regard my two daughters are already provided for by lands ſettled, &c.' It is true the general rule is, that where a legacy or portion is to be paid, at a certain age or certain time, if the legatee die before that age or before the time of payment comes, it ſhall ſink into the land, and has been ſo eſtabliſhed ever ſince the caſe of *Pawlett* v. *Pawlett* (*o*). It was determined originally upon portions, it was afterwards extended to legacies, and taken from circumſtances regarding the legatee's age or day of marriage, the court concluding that parents thought that if their children did not live till ſuch time, that they would not want their portions or legacies. But it cannot be ſaid it holds equally ſtrong where the circumſtances are taken from the conveniency of the eſtate, and not from the perſon of the legatee. *King* v. *Withers* (*p*) before Lord *Talbot* was the firſt caſe where a legacy was determined to be veſted, though charged upon land, on *circumſtances ariſing from conveniency to the eſtate*, for his Lordſhip was of opinion there, the legacy ſhould be raiſed, the time of payment being poſtponed *for the conveniency of the eſtate*; and though Lord *Talbot* took notice of this diſtinction in *Bradley* v. *Powell*, Forreſt. 193, which came before him after *King* v. *Withers*, yet there was a material difference, for the perſon died before the time of payment came, and therefore he determined the portion to ſink; the ſtrong reaſoning in *King* v. *Withers* was, that the teſtator intended upon the event of the ſon's dying, to increaſe his daughter's proviſion and her family. If this be the general doctrine, conſider how it ſtands here: the time of payment was moſt manifeſtly poſtponed in order to prevent the burthen of intereſt falling upon the eſtate of the ſon till he attained his age of 26, and when he has given this expreſs reaſon, to infer from thence that the daughter ſhould loſe the principal, or her repreſentatives, would be a very forced conſtruction. *A dying before the contingency happens* is the reaſon why a legacy that is charged upon land ſhould not be payable; and I do not ſee if the ſon had died before his age of 26, how the daughters could have been intitled. In the caſe of *Lowther* v. *Condon* (*q*), the ſtrong reaſon which weighed with me was, that the portion was directed to be raiſed after the death of the teſtator's

(*o*) *Supra*. (*p*) *Supra*. (*q*) *Supra*.

wife, and therefore poſtponed merely from the conveniency to the eſtate and family, and not intended that the daughters ſhould loſe their portions becauſe they died before their mother, and there are a great many caſes where this court has held it ſhall not be raiſed in the mother's life-time. Therefore, if conſidered ſingly upon the general rules of the court, the legacy would be veſted and tranſmiſſible. I do not reſt it here, but am of opinion on general rules of law, it is a veſted legacy, for the plaintiff might have had a *legal* remedy by ejectment. The words are, *with a power to enter and hold till payment*, &c. This I take to be a right of entry given them to hold the land in the nature of a tenancy by *elegit*, and rightly ſaid at the bar to be a chattel-intereſt. It has been improperly called a power, for it is a right of entry which differs from a power, for a right of entry will go to executors and adminiſtrators; for if a chattel intereſt be granted to a man, though his executors are not named, yet they will take it barely as his repreſentatives. If this be ſo, then there is a legal remedy to enter and hold the lands till principal and intereſt be ſatisfied. Now can it be ſaid, where the plaintiff ſhall have a ſatisfaction in his own perſon at law, yet that I ſhould relieve againſt it in this court, merely upon a will, and where all perſons are volunteers? The caſes have for the moſt part ariſen upon equitable charges, where there is no remedy except in this court, and in the caſes of truſts, as it can be determined here only, whether the truſt has ariſen or not. This is not an *equitable* charge, but a *legal* one, and differs from thoſe caſes, ſo that the party having his remedy at law by ejectment there are no grounds for this court to take it from him. But the plaintiff comes here properly to have an account of the perſonal eſtate of the teſtator in the firſt place, and likewiſe to avoid circuity; for if the plaintiff had recovered at law, then the defendant would have had a right to be relieved here upon payment of principal and intereſt." His Lordſhip decreed the legacies to the plaintiff.

(*r*) *F.* deviſed part of his real eſtate for payment of debts, the ſurplus to his mother, and another part to his mother for life; and afterwards to his couſin *William Rawſon*, his heirs and aſſigns, he and they *paying* thereout legacies to ſeveral perſons; which ſums he willed to be paid *within twelve months next after his mother's deceaſe*; charging his lands therewith accordingly. Then he gave all his houſehold goods and furniture to his mother for life, and after her death to his couſin *Rawſon*, his executors and adminiſtrators, if he ſhould be living at his mother's death; but if his mother ſurvived, then to

(*r*) Hodgſon *v.* Rawſon, 1 Veſ. 44.

her, her executors and adminiſtrators. After the teſtator's death the mother entered, and poſſeſſed the real eſtate, and died; a legatee of 100l. having ſurvived her but one month, the queſtion was, whether his repreſentatives were intitled to have the 100l. paid out of the lands as the legatee died before the time appointed for payment? And by Lord *Hardwicke*, C. "Conſider firſt how it would ſtand at law: then how it ſtands in and is altered by equity. As to the firſt: taking it as a conditional or contingent legacy, it is clear that the executors may have the benefit of it; as in Salk. 170, where the condition of an obligation was to make a leaſe, or pay 100l. the obligee dying, though the election was taken away, it was held, that his executor ſhould have the 100l. which determination is agreeable to the rule of law in caſes of heirs; where the heir though not named, may take advantage of a condition annexed to a real eſtate. In *Marks* v. *Marks*, Eq. Ca. Ab. 106, there was a condition to gain an eſtate, on payment of money in a limited time; the party died before the time, his heir was relieved. 2 Vent. 347, cited in *King* v. *Withers*, was decreed on the ground, that a contingent intereſt is tranſmiſſible to the repreſentative. Thus it ſtands at law with reſpect to the plaintiff. With reſpect to the defendant it was a deviſe on condition of paying; for the deviſee not being heir at law, but a ſtranger, it was a direct condition, not a conditional limitation. Therefore *Wellock* v. *Hammond* (*s*), cited in *Boraſton*'s caſe, 3 Co. 19, is not like this: there it was a conditional limitation. Here is no occaſion to go by that circuity, being a deviſe to a ſtranger and a condition of which the teſtator's heir at law muſt take advantage, who may bring an ejectment againſt the deviſee for a breach in not paying, ſince at law the benefit of the contingency is tranſmiſſible. Then the teſtator having expreſly created a charge on the land, it will bind the land in the hands of the heir, after his recovering in ejectment. Then as to the alterations in equity; the general rule is, that a legatee dying before the legacy is demandable it ſhall ſink into the eſtate. But here being a plain right at law and the land recoverable for non-payment, it would be ſtrange to deprive the legatee of it, and repugnant that the deviſee ſhould loſe his land for non-payment, and yet the legacy itſelf loſt in equity. The general rule in *Pawlett* v. *Pawlett* (*t*), and a multitude of caſes is the ſame, whether it is *at* the day, or *payable* at the day; that diſtinction being admitted in perſonal legacies only. The intent was, that the legacy ſhould veſt, as ſoon as the remainder came into poſſeſſion, it being *he and they paying thereout*, which could not be till they were intitled to the

(*s*) Stated in the next caſe. (*t*) *Supra*.

profits, but it was alſo intended to give the remainder-man a year's time. The teſtator muſt have had in view the legatee's dying in the mother's life, having expreſſed it afterward, where he intended it ſhould defeat the legacy, which not having done here, it is an evidence of his not intending it: and the defendants counſel admit there are caſes where the intent will controul the general rule, as in *Lowther* v. *Condon* (*u*). As to the authorities, the firſt is *King* v. *Withers* (*x*), the ſecond *Bulkeley* v. *Stanlake*, and *Hutchins* v. *Foy* (*y*), which laſt was a bill, brought in the exchequer for a legacy charged on an eſtate, by the adminiſtrator of the wife, who died before the legacy was payable. It was held to be tranſmiſſible on this ground, that the remainder veſted immediately by the death of the teſtator, and therefore the legacy veſted in thoſe to whom payable, and that the deviſee muſt take it *cum onere*, it being equally intended that the legacy ſhould be paid, as that the deviſee ſhould have the eſtate, which is the ſame here, and the eſtate recoverable for a breach. Theſe caſes are ſtrong authorities that the eſtate is chargeable, notwithſtanding the death of the legatee in the life of the tenant for life, and before the remainder attached in poſſeſſion: but there is ſomething more here, viz. that this twelve month clauſe, was not intended to ſuſpend the veſting, and make it contingent, but only as a reaſonable time to the deviſee for payment, which he could not do before he was poſſeſſed; and there is a caſe upon that ground only, which is *Wilſon* v. *Spencer*, January 31, 1732 (*z*), where a teſtator deviſed the payment of his debts and legacies out of ſuch part of the perſonal eſtate, as ſhould not afterwards be ſpecifically deviſed, and if that proved deficient, then out of the real eſtate: and that his executor ſhould *within* 12 *months after his death* levy and raiſe ſufficient to pay 1000*l.* to the younger ſon, to be paid to him immediately when raiſed; charging all his real eſtate, if the perſonal, not ſpecifically deviſed, proved deficient. The younger ſon died before the expiration of the year, and his executors brought a bill for it, againſt the eldeſt ſon the deviſee for life of the real eſtate, with remainder to his ſons. The defendant admitted that it was intended for his brother's advancement, but inſiſted that he dying unmarried before, it was extinguiſhed, and not to be raiſed: the perſonal eſtate was admitted to be deficient, and it was therefore chargeable on the real eſtate, and to take the fate of a legacy out of real eſtate, as it has been decreed. The court held, that it ſhould be raiſed, which is an authority, that the year for raiſing was not ſufficient to

(*u*) *Supra.* (*x*) *Supra.* (*y*) *Supra*, and imperfectly ſtated in this place. (*z*) 3 P. Will. 172.

prevent the legacy's vesting, and was the single ground of that determination. *Hall* v. *Terry*, 1 Atk. 502, is distinguishable from this: there I thought, that from the penning of that legacy, the time was annexed to the gift or substance, and though it had been out of personal estate only, it would not be transmissible. So it was likewise in *Van* v. *Clark* (*a*), and therefore the court which favours real estate will never hold a legacy transmissible, which would not be so, if payable out of personal estate only. But whether those cases are applicable or not, this twelve months time given is a sufficient ground for this decree within the authority of *Wilson* v. *Spencer*. Therefore this legacy must be raised, and paid with interest at 4-per cent. from a year after the mother's death."

(*b*) *G.* devised lands to his sister *M. B.* in fee, paying 100*l.* *per annum* to his wife for life, and also legacies to several of his nephews and cousins, within 12 months after his wife's death. Several of the legatees died before the wife, and the question was, whether these legacies were transmissible to the representatives of the legatees? And Lord *Hardwicke*, C. "It may be difficult to reconcile all the cases cited, many of which turn upon nice circumstances. I cannot help thinking, that if the court should determine the legacies to sink into the inheritance, it would be contrary to the intention of the testator, and be going much further than the court has ever gone. He had at the time a young wife: two sisters who would have been his co-heirs, one of them was living, the other dead. It was his intention to provide for his wife and children, if he had any, if not, for both branches of his family. There is a material clause in the will: 'Provided that in case my wife shall at my death have a child or children who shall live to 21, then I revoke the devises and bequests, except the annuity to my wife, and give all my said lands, &c. to such child or children, his, her, or their heirs.' In what event has he declared the legacies should cease? If his wife should be *ensient*. Two questions, first of equity; second of law: 1st, whether the legacies as given in this form of words are determined and sink into the inheritance by the death of the legatees in the lifetime of the wife? But that rule is attended with a good many exceptions, it took its rise from *portions* as *Pawlett* v. *Pawlett* (*c*). By subsequent extension of the rule, courts have gone further, and carried it to legacies given not by way of portion, but given by a stranger, and charged on the land in certain events. Yet notwithstanding a more liberal discretion has been used in case of such legacies not given by way of portions, and which could not be so from

(*a*) *Supra.* (*b*) Tunstall v. Brachen, Ambl. 167. (*c*) *Supra.*

the nature of the thing, and the court has ſifted into all the circumſtances of the caſe to find out the real intention. In *Bruin* v. *Bruin* the portions were not wanted, and therefore ſunk into the inheritance, becauſe the court would not ſuffer them to be raiſed for a different purpoſe than that for which they were given. *King* v. *Withers* (*d*) is a very ſtrong caſe, and Lord *Talbot* did not govern himſelf by there being two contingencies, but went on more ſolid grounds, that is the intention. *Lowther* v. *Condon* (*e*) has been mentioned on both ſides, but I think not applicable to either. There are two particularities in that caſe: 1ſt, It is given to the daughter, her *executors and adminiſtrators*; 2dly, the teſtator has expreſsly directed that the 1000l. given to the other daughter, ſhould go to the ſurvivor, and not ſink into the inheritance. *Hodgſon* v. *Rawſon* (*f*) cited and much relied upon for the plaintiffs. There were two grounds. 1ſt, *J. H.* lived a month after the mother, but did not live till the time, which was twelve months; and therefore not due till the laſt period;—2dly, There was no right of entry at law. *Hall* v. *Terry*, 1 Atk. 502, cited for the defendants. Great weight was laid in that caſe on the penning of the will. There was no expreſs gift, but only a direction to pay at 21. Even a perſonal legacy, in ſuch caſe, would not be veſted till 21, though had it been given expreſsly it would have veſted before, and 21 would have been only the time of payment.—*Bradley* v. *Powell*, Forreſt. 193, before Lord *Talbot*. I ſhould not have been of the ſame opinion. It was a very hard determination. From hence I infer the uncertainty of laying down general rules. It is probable the teſtator in this caſe thought the amount of the legacies was little more than a moiety of the value of the eſtate. The objection in *Hall* v. *Terry*, as to its being only a direction to pay and not a gift, does not hold here.—Second queſtion. There is a remedy at law for theſe legacies, according to *Wellock* v. *Hammond*, Cro. Eliz. 204, and cited in *Boraſton*'s caſe, 3 Co. 20, b. A copyholder in fee of lands, in borough-engliſh, deviſed to his eldeſt ſon, *paying* his daughter and other ſons 20l. each within two years after his death, and ſurrendered to the uſe of his will. The eldeſt ſon entered and did not pay the money: and held it was not a condition, but a limitation, of which the youngeſt ſon as heir at law in borough-engliſh might take advantage, that is a limitation unto the eldeſt, until he make default in payment. Objection, there are ſeveral legatees in this caſe, and it is impoſſible to aſcertain their ſhares, nor can they join in ejectment. But *Wellock* v. *Hammond* is an anſwer to that objection. There were ſeveral legatees in that caſe. So in the preſent caſe, it is a conditional limitation

(*d*) *Suprà*. (*e*) *Suprà*. (*f*) *Suprà*.

to *M. B.* until default of payment of the legacies, and then her estate determines, one moiety of which will then be in her as heir at law, and the other in the son of the other sister (who is dead) as co-heir, and for which he might maintain an ejectment. Decree legacy to be raised with interest from the end of one year *after* the death of the widow."

(*g*) *H.* devised his freehold estates to his son *John Neabon*, in tail, remainder to his daughter *Prudence*, in tail, remainder to his daughter *Elizabeth* for life, with remainder to her son *J. Trigg*, in fee, upon condition that he paid to his elder sister the plaintiff's mother 100*l. at or soon after his being possessed of the premises*, and for non-payment the estates should be to the plaintiff's mother, &c. and if *J. Trigg* should die before his being possessed of the premises, then to the next heir male of *Elizabeth*, under the same proviso and condition of paying 100*l.* to the plaintiff's mother.—*John*, *Prudence*, and *Elizabeth Neabon* being all dead, the plaintiff's mother also died, after which the remainder in fee in the above estates became vested in possession of *J. Trigg*, and the question was, whether, as the plaintiff's mother died before the legacy was payable, the plaintiff as her executor, was entitled to have it raised, the event upon which it was to be paid having taken place? And Lord *Hardwicke*, C. said it was a very plain case, that it could not be intended as a mere personal legacy, as it was not likely that the plaintiff's mother should live to the time of the remainder vesting in *J. Trigg*, which was after two estates tail. That in many cases money had been directed to be raised where it was likely the legatee would die before the event happened. That this was a conditional limitation, and there was a legal remedy for raising the money; it was a condition subsequent, as all conditions turned into limitations were: it was to be raised after *John Trigg* came into possession. That the only doubt was from the devise over being limited to the mother, without saying "her executors," but with an "&c." but it was agreeable to law, that it should extend to her executors, and as the testator was writing what would be the law, he left off with putting an "&c."—His Lordship therefore decreed in favour of the plaintiff.

(*h*) *J.* being intitled to a farm let to *Thomas Taylor*, at 100*l.* a-year, and also to a dwelling-house, and to the great and small tythes of *B.* of little value, devised to his wife his capital messuage, and lands belonging to it, and likewise all his estate in the occupation of *T. Taylor*, and declared, that when his son *William* should attain 21, his wife should pay *William* 40*l.*

(*g*) Embrey *v.* Martin, Ambl. 230. (*h*) Manning *v.* Herbert, Ambl. 575.

a-year out of the lands in the occupation of *T. Taylor*; the testator then proceeded;—"*Item*, I give unto my two daughters *Jane* and *Elizabeth*, the great tythes and small, and likewise my will and mind is, that six months after my wife's decease, my son *William* shall pay out of the estate or lands that are now in the occupation of *T. Taylor*, 600l. to my two daughters *Jane* and *Elizabeth*; and in so doing, I give and bequeath all my capital houses, and the house where *T. Taylor* now lives, with all their lands and appurtenants, and all other lands that I have, unto my son *William*, and his heirs for ever; that is to say, 300l. of lawful money of Great Britain, each. In case one of them should die before the time, they or either of them shall survive my wife, then my will and mind is, the survivor shall have the tithes afore-mentioned, and only 400l. out of the afore-mentioned *T. Taylor's* estate, and for non-payment thereof, it shall and may be lawful for them and either of them to enter or re-enter upon the said estate that *T. Taylor* now lives in, and peaceably enjoy it, with all the rights and privileges whatever, till they or either of them are paid all their charges, and full sum of monies, according as the will directs. And I appoint my wife executrix."—*Elizabeth* having survived the testator, married and died in her mother's life-time. *Jane* having survived *Elizabeth*, married the plaintiff, and also died before her mother. The mother having died, and *William* succeeding to the estate upon her death, he sold it to the defendant and his trustees with notice of the will. Question, whether the plaintiff as administrator of *Jane*, his late wife, was intitled to have the 400l. raised out of the estate, notwithstanding *Jane* died before it was payable? And by Lord *Camden*, C. "I am clear that the portion ought to be raised. The cases on this head have proceeded upon nice distinctions, and it is difficult to collect out of them any general rule. The rule laid down in *Pawlett* v. *Pawlett* (*i*), went upon this ground, that the portion was not wanted. While the court adhered to the rule in exactly the same case, there was no inconvenience, but it was afterwards extended to charges upon land in general, and became universal. This grew inconvenient and mischievous, and being a rule in equity, the court has for some time laboured to distinguish every case out of that general rule. The testator in the present case, is planning out his estate among his children, it would have been inconvenient to have given portions to his daughters immediately, in the life-time of the mother. It seems *that in all cases where portions are postponed, without being made payable at* 21 *or marriage, the postponing is for the convenience of the estate*; but yet in all those cases of postponing, in order to make it a vested interest, there must be words of gift. In *Sherman* v. *Collins* (*k*), the words

(*i*) *Suprà.* (*k*) *Suprà.*

'not to pay interest in the mean time,' operated as words of gift. In *Emes* v. *Hancock* (*l*), the court determined upon the right of entry. In the present case, the testator seems to give the tithes and 400l. and if there was occasion for it, the court might lay hold of it as words of gift; but it is not wanted, for *Emes* v. *Hancock*, is a precedent in point upon the right of entry. Lord *Hardwicke*, in that case, makes a sound distinction between law and equity. The words 'executors and administrators," not being in this case as in *Emes* v. *Hancock*, makes no difference, for they are implied; being a legal right it is a vested interest. As to the clause of survivorship, it was argued from it on both sides. On the one hand it was said to appear from thence, that the executors and administrators were not to take, on the other hand it was said to appear from thence, that only 200l. should merge. But those arguments have no weight with me either way. Decree principal, interest and costs."

(*m*) *H.* devised two houses to his wife for life, and immediately after her decease to the defendant *Tichener*, in fee, he paying *thereout* to the testator's cousins, *Henry* and *Thomas Thornton*, 20l. a-piece, *within three months after the death of his wife*. The testator died in 1752, and his wife entered. *T. Thornton* survived the testator, and bequeathed his legacy of 20l. to the plaintiff *Jeal*, but appointed no executor. *Jeal* obtained administration. *H. Thornton* survived the testator, and died in 1758, intestate; administration was granted to the plaintiff *E. B.* The testator's widow died in 1767, and the defendant *Tichener* entered, who insisted, that as the *Thorntons* died in the life of the wife, the legacies were not payable: but Lord *Apsley*, C. declared that the legacies vested in them so as to be transmissible to their representatives, and were a charge on the premises devised to the defendant.

(*n*) *K.* devised his real estate to trustees, to the use of *T. S. Mason*, for life, remainder to trustees, &c. remainder to his first and other sons, in tail general, remainder to daughters, in tail general, remainder to his wife for life, remainder to *Alexander Wilson*, in fee, with proviso, that *Alexander Wilson*, or his heirs, *if he or they should actually come into possession* by virtue of the limitation in the will, should pay to his daughter *Elizabeth Wilson*, 2,000l. and the testator charged all the premises with the payment of the 2,000l. to *Elizabeth Wilson*, at the end of two years next after *Alexander Wilson*, or his heirs, should come into possession as aforesaid. The testator died, *T. S. Mason* surviving, who entered, and died in 1760, without issue,

(*l*) *Suprà*. (*m*) Jeal *v.* Tichener, 1 Bro. CC. 120, *in notis*, Ambl. 703. SC. (*n*) Clarkson *v.* Ross, 1 Bro. CC. 120. *in notis*.

but, by virtue of a power in the will, appointed the whole estate to his wife for her jointure.—She, on his death, entered, and enjoyed till 1769, when she died. In 1750, a commission of bankruptcy issued against *Alexander Wilson*; *Ross* was chosen assignee: on the death of *Elizabeth Mason*, the reversion in fee simple vested in *Ross*, and he entered and enjoyed two years. *Elizabeth Wilson* in 1737, married *William Draper*, and died in 1743; *William Draper* died in 1759, and made a will, and appointed the plaintiff executor, who was also administrator of *Elizabeth Draper*. The Lord *Chancellor* decreed the legacy to be raised with interest, from the end of two years after *Ross* came into possession.

1 (*o*) *L.* by his will, dated 26th of March, 1751, after directing, that all his funeral expences and debts should be paid, charged the same upon all his real and personal estate, and subject to such payments, and to such legacies, annuities, and other out-goings, as should by will, or by any other means, be created or made by him, or to which the same then were, or should at his death be any otherwise liable, he gave all his real and personal estate unto his wife *Elizabeth*, since deceased, and the defendant *Eleazer Davy*, their heirs, executors and administrators, upon the trusts and for the purposes after-mentioned. And reciting, that his brother, the defendant, *Benjamin Kemp*, was intitled to two annuities of 60*l.* and 12*l.* payable during his life, out of his estates, he directed his trustees to pay them, and then gave to his wife an annuity, or clear yearly rent-charge of 350*l.* for life, to be paid out of the rents, &c. of his said estates, and bequeathed to her 500*l.* which he directed should be raised and paid to her within three months after his death, but in case she refused to accept these in full satisfaction of all her claims out of his real and personal estates, they were to sink into his estate: and after giving her some specific legacies, he gave unto *P. Merry*, one of the plaintiffs, an annuity of 150*l.* for life, payable to her or her assigns out of the rents and profits of his said estates, and to the defendant *M. Short*, a like annuity of 20*l.* He then directed his trustees, out of the rents and profits of his estates, to pay or allow unto such person as should maintain his nephew *J. Kemp*, such sums of money as they should think fit, not exceeding the yearly sum of 80*l.* until the age of 17, and from that time until 21, not exceeding 100*l.* a year. He also directed his trustees to pay or allow to such person as should maintain the plaintiff *Mary Kemp*, such sums of money as they should think fit, not exceeding 40*l.* a year, until the age of 18, and give her 1500*l.* to be paid to her on attaining that age, but if she happened to die before 18, he

(*o*) Kemp *v.* Davy, 1 Bro. C.C. 120, *in notis*.

directed that the legacy should sink into his estate, and not be transmissible to the personal representative. And he directed that his trustees should, out of the said rents and profits, pay or allow to such person as should maintain the defendant *S. Adams*, such sums of money as his trustees should think proper, not exceeding 40l. a year, until the age of 24, and after he attained the age of 18, and between that time and his attaining 24, the testator directed his trustees to pay him such further sums, as they should think fit, not exceeding 200l. and the testator gave him 1000l. to be paid at the age of 24, but if he died before that time, the legacy was to sink into the testator's estate, and not become payable. The testator then gave legacies to several persons, to be paid as soon after his death as might be for mourning; among these persons were, his sister *Elizabeth Kemp*, *Jane Blois*, the defendant *M. Short*, and his brother the defendant, *Benjamin Kemp*, and he gave a legacy to the defendant *Davy*, for his trouble, and appointed him, and his (the testator's) wife executors. The testator then directed, that if his nephew *J. Kemp*, should attain 21, his said wife and *Davy*, or the survivor should convey all his real and personal estates to his said nephew, in fee, subject to such of the annuities as should be then subsisting, and to such debts, legacies, and charges, as might then affect the same, but if his nephew happened to die before 21, he gave several additional legacies, viz. to his wife 2000l. to his sister *Jane Blois*, 1000l. to his sister *M. Short*, 1000l. to his sister *E. Kemp*, 1000l. and to the defendants, *Benjamin Kemp* and *Davy*, 500l. a-piece, with a direction that those several legacies, should be paid, and payable *within six months next after the death of his nephew under the age of* 21. And he empowered his trustees to raise the additional legacies by mortgage of the estates devised to them, and subject and chargeable as aforesaid. And in case his nephew died before 21, and if the plaintiff *Mary Kemp* attained her age of 21, then the testator gave and bequeathed the residue of his real and personal estate unto *Mary Kemp*, her heirs, executors, and administrators, and directed his trustees to convey and assign the same accordingly. He also directed his trustees to apply the savings from his estate when of competent amount, in discharge of such debts, charges and incumbrances affecting the same, as they in their discretion should think fit. *Elizabeth Kemp* having survived her husband, the testator, died in *February*, 1768, having by will, appointed the defendants *Davy* and *Godschall* executors.—*Elizabeth Kemp* one of the sisters, died in the beginning of the year 1763, and *Davy* was also her representative. *Jane Blois* died in 1766, having made *Davy* executor of her will. *John Kemp*,

the nephew, died in January, 1771, unmarried, at the age of 16, leaving *Mary Kemp* his heir. One of the questions in the cause was, whether as the testator's widow, his sisters *Elizabeth Kemp*, and *Jane Blois*, after surviving him, died in the life-time of *John Kemp* the nephew, their personal representatives were entitled to the additional legacies given them upon the contingency of *John Kemp*, dying under 21? And the court held, that the legatees took vested interests which were transmissible to their representatives.

(*p*) *M.* devised real estate to his wife *Temperance*, for life; remainder to his son *Robert*, in tail male, remainder to the testator's right heirs in fee, upon condition that *Robert* or those then in possession of this estate, should within six months after the death of the testator's wife, pay his two daughters *Mary* and *Temperance*, 1200l. viz. 600l. to each, and interest at 5 per cent. from the death of their mother, with right of entry to the daughters in default of payment.—August, 1739, the testator died. August, 1754, *Temperance*, the daughter died. December 21st, 1754, *Temperance* the mother, died. 1774, *Mary*, the other daughter died, having administered to her sister *Temperance*. The personal representative of *Mary* and *Temperance* brought the bill against *Robert*, for the 600l. bequeathed to *Temperance* the daughter, with interest from the mother's death; and upon the authorities of *Hutchinson* v. *Foy*, and *Hodgson* v. *Rawson* (*q*), Lord *Bathurst* determined that the charge vested with the land and decreed for the plaintiff.

(*r*) *N.* being seised of a reversion in an estate, expectant upon the death of his aunt, devised this estate to his wife for life, with remainder to *Dow*, in fee, subject to the payment of 200l. to his daughter *Elizabeth*, *six months after his wife's decease*, with a right of entry in default of payment.—*Elizabeth* died in 1750; the mother in 1754; the aunt in 1760.—And Lord *Northington*, C. held this to be a vested interest in the daughter, and decreed the 200l. to be paid with interest from the death of the aunt, it appearing from the words of the will that the son was to pay the 200l. out of the rents of the estate.

(*s*) *O.* divised his estate to his wife, for life, remainder to his daughter *Mary*, in fee, charged with 400l. to his four younger daughters, *within one year after the death of his wife*, with interest from the death of the wife.—Two of the younger sisters died in the life of the mother, unmarried; the eldest daughter also died in the life of the mother, so that *Mary* was never possessed of the remainder in fee of the estate, but it descended to

(*p*) Pawsey *v.* Edgar, 1 Bro. CC. 192, *in notis*. (*q*) *Suprà*. (*r*) Thompson *v.* Dow, 1 Bro. CC. 193, *in notis*. (*s*) Morgan *v.* Gardiner, in Exchequer, 1 Bro. CC. 193, *in notis*.

her only son; and it was held in the Exchequer that the legacies to the younger daughters were vested interests transmissible to the representatives of the deceased daughters.

(*t*) *P.* devised an estate to his wife, for life, and if there should be no issue between them, then he gave it to the defendant charged with 100l. to *W. Ranscomb*, *and* 100l. to *M. Ball*, to be *paid in six months after the death of his wife*. The testator, by a codicil, reciting, that *M. Ball*, was since dead, gave 50l. of the 100l. legacy bequeathed to her, to *W. Ranscomb*, and the remainder of it to *A. Beaumont*, to be paid at the time when *M. Ball* would have been intitled to receive the legacy, if she had lived. *W. Ranscomb* survived the testator, but died before the wife, and appointed the plaintiffs his executors, who, after the death of the testator's wife, commenced a suit for the 100l. and 50l. And Lord *Thurlow*, C. "If the time when the legacy is to be paid, is attached to the legacy itself, as for instance, to *A. B.* at the age of 21, it makes such a description of the person who is to take, that if the person does not sustain the character at the time, the legacy will fail. But if the legacy be to *A. B.* and that it shall be payable at 21, the description is satisfied, and the rest refers to the payment only. This is the rule as to legacies out of personal estate. In the case of land, another rule has taken place, and at first, universally, and without any distinction, that being a condition, the money is not payable, unless the whole condition is complied with. This rule has long been thought too much strained, and therefore not much relied upon, in the later cases; but another distinction has been thought of, that the condition referred to the circumstances, either of the *person* or of the *estate*. Where it applies to the circumstances of the person to take, as in the case of a portion, the court has construed a sum so given, to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose, so that the purpose failing, the land ought not to be charged. There has been another point also taken into consideration, whether giving the money directly payable at a certain time, shall make the time so essential as to annihilate the gift, if it does not concur, or it shall be a gift in *præsenti*, to be paid at the future time. There is a long string of cases to this purpose, which establish the rule, that where a legacy is given out of a particular fund with a reference to the time when it shall vest in possession, as for instance to *B.* with a charge to *C.* it is a distribution of the fund between the person to take in present, and him to take in future, and the gift to *C.* vests immediately. This is a devise after the death of the wife to *Killet*, and the testator charges

(*t*) Dawson *v.* Killet, 1 Bro. CC. 119.

the estate of *Killet*, (meaning the interest of *Killet* in the estate) with the sums in question, which distributes the estate between *Killet* and the legatees. Upon the death of the testator the remainder vested in *Killet*, and the moment it vested in *Killet*, the charges vested in those to whom they were given. It is said the codicil varies the construction, but I cannot see in what manner. The testator takes notice that the legacy to *M. Ball* was gone, and gives it to the others, at the same time that she would have taken it had she been alive. He was taking notice of a legacy which was to vest at his death, but not to be paid till a future time, and only directs, that it shall be in *statu quo*, it would have been in case of her living. He did not mean to change the form of the legacy, it was merely transferred to other names, to be demanded by them, when it might have been by her if it had not lapsed. The legacies of 100l. and 50l. must therefore be raised for the plaintiffs, with interest from six months after the death of the wife."

(*u*) *Q.* devised his real estate to his second son *James* in fee, after the death or marriage of his the testator's wife *Elizabeth*, with a proviso, that he should pay unto the testator's daughter *Mary*, then the wife of the plaintiff, but since deceased, 100l. and unto *Martha* 80l. to be paid within one year after the death or marriage of his wife.——The testator died, leaving *Stephen* his eldest son and heir at law. His widow entered and died in 1776, but *Mary* the legatee, died before her in 1774, and the question was, whether the husband and representative of *Mary*, was intitled to the 100l. as she died before the time arrived for payment of it. And by Lord *Thurlow*, C. "In the case of portions sinking because the party never attained such an age, as to want them, Lord *Talbot* said, it was *causa data et non secuta*, *King* v. *Withers* (*x*). Even if the reasoning in that case should be thought too nice, it is now too late to overturn the rule.—In that case, the charge was not intended to operate upon the estate tail of the son, but upon the reversion. There is another case which is always attempted to be reasoned away, the Earl of *Rivers* v. the Earl of *Derby*, 2 Vern. 72. That case stood upon its own bottom, and it was equally a gift of the 10,000l. to the daughter as of the fund of the estate to the remainder-man. The case of *Buckley* v. *Stanlake*, mentioned in *King* v. *Withers*, Forrester, 119 (*y*), is also to the same point; there the legatees died before the daughter, and in the life-time of the wife, yet their representatives took the legacies. That case, exclusive of the circumstance of the wife's devise to perform the husband's will is exactly in point. *Jackson* v. *Farrand*, 2 Vern. 424, applies to this point. It was a case where, if ever,

(*u*) Godwin v. Munday, 1 Bro. CC. 191. (*x*) *Supra*. (*y*) *Supra*.

the rule with respect to portions ought to have taken place.—There is one rule which will apply to and reconcile all the cases, but there the heir was so little favoured, that the estate was exhausted. The case of *Butler* v. *Duncomb*, 2 Vern. 760, also applies very particularly. The court in that case raising the money by consent, shews they thought it would be raisable at the death of the mother. The next case I cite, is *Brome* v. *Berkley*, 1 Eq. Abr. 340. I mention it only for the sake of its being there said, that the portion was certainly raisable, though not at that time. *Hodgson* v. *Rawson*, 1 Vesey, 44 (*z*), was after *Hutchins* v. *Foy*, Comyns, 716 (*a*), and determined with reference to it. The postponement of the payment for a year, was only to give time to raise the money. The time of marriage or death of the wife, in this case does not make it a portion. It is equally a gift of this part of the reversion to the daughter, as of the other part to the devisee. I am aware that there are many cases, such as *Pawlett* v. *Pawlett*, 1 Vern. 204, 321, 2 Vern. 366.—*Smith* v. *Smith*, 2 Vern. 92.—*Bruen* v. *Bruen*, 2 Vern. 439.—*Carter* v. *Bletsoe*, 2 Vern. 617.—*Tournay* v. *Tournay*, Pr. Ch. 290.—*Hall* v. *Terry*, 1 Atkins, 502, that cannot be reconciled with the other cases I have now cited, or with *Lowther* v. *Condon*, 2 Atk. 127" (*b*).

Questions have arisen between *heirs* at law and the *devisees* of lands *charged* with the payment of legacies or annuities which have lapsed by the death of such legatees and annuitants, or have been originally void, as when given to charitable uses, whether they should belong to the former, as part of the real estate undisposed of, or whether they should merge in the land for the benefit of the latter, as constituting part of their estate; and the better opinion seems to be that those charges will sink into the real estate in favour of the devisees (*c*).—In *Kennell* v. *Abbott* (*d*), the *Master of the Rolls* thus expressed himself on this subject:—"It was long doubted, whether if an estate were devised charged with legacies, which failed from the nature of the legacies themselves, as if they were charitable legacies, the devisee was intitled to so much as consisted of those legacies. In *Barrington* v. *Harris*, in which the question arose, Lord *Bathurst* at first thought the heir intitled upon the cases of *Cruse* v. *Barley* (*e*), and *Arnold* v. *Chapman*. But afterwards, his Lordship changed his opinion, and determined, and it is now perfectly settled, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate."

(*z*) *Suprà*. (*a*) *Suprà*. (*b*) *Suprà*. (*c*) Wright *v.* Row, 1 Bro. CC. 61. Jackson *v.* Hurlock, in the notes to that case. Jennings *v.* Lookes, *suprà*. (*d*) 4 Ves. Jun. CC. 810. (*e*) 3 P. Will. 20.

SECT. III.—*Of the Executor's Aſſent.*

With reſpect to the neceſſity of the executor's aſſent to the enjoyment of the legatee of his legacy, ſuch aſſent is neceſſary to the bequeſt of chattels only; and in thoſe caſes the legatee cannot legally appropriate any part of the teſtator's aſſets in ſatisfaction of his legacy without ſuch aſſent, for the legal intereſt in the whole of the teſtator's perſonal eſtate is veſted in the executor by operation of law, who is in the nature of a truſtee in relation to ſuch perſons as may have any claim upon it (*a*).

It appears to have been the practice of the *Bank of England*, grounded upon the ſtatute 5th *William* and *Mary*, cap. 20. by which the Bank was inſtituted, and by the other acts of parliament which regulate the deviſe of property transferable at the Bank, (by which the probates of wills are directed to be there depoſited, for the purpoſe of having the truſts extracted) that where bank ſtock, &c. has been ſpecifically bequeathed without the intervention of truſtees, to permit the transfer to be made to the legatees, and not to the executor; and when truſtees have been appointed, then to the truſtees with a reſtriction not to allow of a transfer to any other perſons except thoſe named in the will. It ſeems, however, that this practice is erroneous, and that the executor having the legal right to the ſpecific as well as to the general aſſets, to pay debts, &c. has the ſole right to call upon the Bank to transfer the ſtock into his name, as no intereſt in it veſts in the legatees prior to his aſſent. It alſo appears to be immaterial whether ſuch property be given *ſpecifically* in the ſtrict ſenſe of the word, or as a *reſidue*; ſuch property being to be conſidered in no other view than the other general aſſets as to this purpoſe, and therefore ſubject to all the incidents of a teſtamentary diſpoſition of perſonal eſtate (*b*).

It may be a queſtion, whether if a teſtator by his will forgive or releaſe his debtor from the money owing to his eſtate, ſuch releaſe or forgiveneſs will require the aſſent of the executor before it can take effect, and it ſeems that the executor's aſſent is neceſſary, for the debt may be wanted to pay the creditors of the teſtator, and againſt them it muſt be conſidered as a legacy, ſo

(*a*) Co. Litt. 111. a; Perk. ſec. 488, 570, 572. Swinb. pt. 4. p. 235. Off. Ex. 221. Dy. 254. 2 Atk. 77 (*b*) Bank of England *v.* Moffat, 5 Bro. CC. 262. Bank of England *v.* Parſons, 5 Ves. Jun. CC. 665.

that the caſe falls within the general rule which requires the executor's aſſent previous to the veſting of legacies.

Although the aſſent of the executor be neceſſary to complete the title of the legatee, yet before ſuch aſſent, the legatee takes an *inchoate* right or intereſt in the ſubject of the bequeſt, which may be forfeited, and which will be tranſmiſſible to his perſonal repreſentatives in caſe of no diſpoſition by will (*c*).

So complete is the title of the executor to the perſonal property of his teſtator, that if a legatee intermeddle with it without his leave, the executor may maintain an action of treſpaſs or trover againſt him (*d*). And it has been alleged and admitted, that if the deviſee of a term for years enter upon the lands without the executor's permiſſion, he will be conſidered a diſſeiſor (*e*).

The executor's aſſent being analogous to a tenant's attornment to the grant of a reverſion, a ſmall matter will be conſtrued an aſſent (*f*), and whatever verbal agreement will amount to an attornment, may conſtitute an aſſent to a legacy (*g*). Expreſſions to the following effect have been adjudged to amount to an aſſent;—"God ſend you joy of your bequeſt,"—"I intend you to have your legacy according to the deviſe." The executor's allowing the deviſee of a term to receive the rents for a time only, or applying the rents for the deviſee's maintenance during minority, when they were directed to be ſo applied by the will, has been conſidered an implied aſſent (*h*).

An executor may aſſent *before* probate (*i*), and in inſtances where there are two or more executors, the aſſent of any one or more of them is ſufficient (*k*). And if a legacy be given to *one* executor, he may aſſent to the bequeſt without the concurrence of his co-executors, and retain the legacy (*l*), and according to *Perkins*, even before probate or adminiſtration (*m*). But executors cannot aſſent to legacies *conditionally*, except the condition be *precedent* to the aſſent (*n*), nor ſubject to revocation, for in each caſe the aſſent will be conſidered good and abſolute. Thus, if the bequeſt were of goods, and the executor delivered them to the legatee to re-deliver at a ſubſequent period; the delivery would be a good aſſent, and the direction of re-delivery, void (*o*).

It ſeems that an adminiſtrator, *durante minore ætate*, of an infant, cannot aſſent to a legacy to prejudice the infant, ſuch adminiſtrator being merely appointed for the infant's benefit (*p*).

(*c*) Off. Ex. 28—29. (*d*) Off. Ex. 27. Keilw. 128. (*e*) Owen, 76. (*f*) Off. Ex. 226. 4 Bac. Abr. 445. 2 Ventr. 358. (*g*) Touchſt. 466. Off. Ex. 224. (*h*) Leon. Rep. 129. Plowd. Com 539. (*i*) Godelp. Orp. Leg. 144. c. 20. ſ. 1. Dy. 367, a. 2 Freem. 23. (*k*) Off. Ex. 223. 3 Atk. 510. (*l*) 11 Hen. 4. 84. (*m*) Sect. 572. (*n*) Off. Ex. 236. (*o*) Leon. Rep. 129—130. 4 Rep. 28, b. Swinb. pt. 1. p. 25. (*p*) Prince's Caſe, 5 Rep. 29, b.

And as it is provided by the act of the 38 Geo. III. c. 7. ſ. 6. and 7. that the adminiſtration is to continue until the infant attains twenty-one, it may be inferred that the infant executor cannot legally give his aſſent to a legacy before he arrives at maturity.

Where a legacy is limited to ſeveral perſons in the nature of remainders by executory deviſe, the executor's aſſent to the firſt taker will be conſidered an aſſent to thoſe who are to ſucceed; and, *è converſo*, his aſſent to one of the ſubſequent takers will enure to the benefit of the perſons who take prior intereſts in the property bequeathed, and the reaſon is, becauſe the ſeveral intereſts of the legatees conſtitute in the whole but one eſtate. If, therefore, a term for years were deviſed to *A.* for life or years, or for ſo long as *A.* continued unmarried, with remainder to *B.* and the executor aſſented to the intereſt of *A.* ſuch aſſent would extend to *B.* ſo as to veſt alſo his intereſt; in like manner if the aſſent had been given to *B.* it would have enured to *A.* (*q*). And the ſame rule ſeems to hold in bequeſts of chattels perſonal, for if the uſe of a book, glaſs, &c. were bequeathed to *C.* with an abſolute gift of it after *C.*'s death to *D.* an aſſent to *C.* would alſo veſt the intereſt which *D.* took by the will (*r*). The law is the ſame (though it ſeems to have been once otherwiſe (*s*),) whether the ſubſequent legatee be entitled to a rent given out of the term, and not to the remainder of the term itſelf: accordingly, if a term were deviſed to *A.* for life or for years, with a rent out of it to *B.* the aſſent of the executor to *A.* or to *B.* would in either caſe enure to the benefit of both (*t*), and perhaps for this reaſon, as the aſſent of the executor is required as well for the benefit of creditors as for his own ſafeguard, an inference ariſes from his aſſent to one of the legatees of the ſpecific property, that he has no occaſion for the term or rent to pay debts, for if he had, then his aſſent to either of the legatees would be improper, as both ought to abate *pro ratâ*.

In general, when a partial intereſt is given to executors, as for life, with limitations over upon their deaths; if the executors enter *generally*, they will be conſidered as entering *qua* executors, and ſuch entry will not amount to an implied aſſent to the limitations over (*u*). But the ſlighteſt act of the executors indicating a different intention, will convert their entry into that of legatees, and conſequently operate as an aſſent to all thoſe in remainder. Accordingly, if the executor declare,

(*q*) Bro. Abr. "Deviſe" 235. ſ. 13. Plowd. Com. 516, 519. Com. Dig. "Admon." c. 6. Off. Ex. 236. Perk. ſ. 574. 3 P. Will. 12. (*r*) Plowd. Com. 519. 543. Old Nat. Brev. 80. (*s*) 3 Bulſtr. 122. Bridg. 55. (*t*) 8 Rep. 95. (*u*) 10 Rep. 47. b. Cro. Eliz. 347. 386. Com. Dig. "Admon." c. 7.

that he enters or will have the subject of bequest, under the will, or that the subsequent legatee shall have it after him (*x*), or if he take the profits, suppose of a term for years, to his own use (*y*), such declarations and act will amount to an election and assent, to take under the bequest; and if a person devise to *one* of his executors alone, a term of years for part of the time, and the residue of it to a stranger, and the executor alone entering generally, occupies it himself, and the other executors do not intermeddle with it; this is a good assent to execute the legacy to him in remainder, and yet if one give goods to one of his executors for life, and afterwards to a stranger for life, and this executor alone gets the goods into his own hands, and occupies them alone during his life; it seems that such occupation, without some assent, will not execute the gift to the second legatee (*z*).

It seems to have been formerly matter of doubt, whether a *married woman* appointed executrix, was competent to assent to a legacy without the privity and concurrence of her husband; the doubt, however, appears to have been removed by the decision in *Russel's* case (*a*), according to which, as she is adjudged incapable of releasing a legacy without her husband, on account of the injury he might sustain (*b*), so her assent to a legacy without his permission, must be negatory and ineffectual; and of this opinion was the court in the case of *Cooker* v. *Bellamy* (*c*).

(*x*) 1 Lev. 25. (*y*) 1 Roll. Abr. 619. (*z*) Toulchst. 457. Perk. sect. 574, 575. Fitz. Dev. 6. (*a*) 5 Rep. 27, b. (*b*) Cro. Car. 519. (*c*) Sid. 188.

CHAP. VI.

Of charging Legacies upon the real Eſtate.

HEIRS have been always looked upon with favour by courts of juſtice, which have eſtabliſhed a general rule of conſtruction to their advantage, viz. "that plain words are required to diſinherit them (*a*)." Such being the general rule, words equally plain, or indicative of a violent preſumption of intention, are neceſſary to create legal charges upon their eſtates: *general introductory words*, however, will have that effect in favour of creditors (*b*), but whether the ſame, or ſimilar words of preſumption, will have the like effect in favour of legatees, ſeems to be a queſtion not altogether free from doubt.

In *Tompkins v. Tompkins* (*c*), it was determined, that the words "after debts and legacies paid," joined with the manner of bequeathing the legacies and the real eſtate, were ſufficient to charge the former on the latter fund. The caſe was to this effect.—*A.* bequeathed 500l. a piece to his daughter *B.* and two other daughters, payable at their reſpective ages of twenty-one or days of marriage, *out of his ſtock*. *A.* then deviſed the rents of his real eſtate to his wife for life, in lieu of dower, and for the maintenance and education of his children, and alſo for raiſing and making up his daughters portions, and proceeded, "after my debts and legacies paid and ſatisfied, *I give and deviſe all my land, tenements and hereditaments, to my ſon C. and his heirs.*" *A.* appointed his wife and ſon executors, and died, leaving ſtock to no larger amount than 100l. the wife entered, and the two other daughters marrying, received their portions. *B.* having attained twenty-one, inſtituted a ſuit for her portion, the wife being then dead. *C.* the ſon and ſurviving executor of his father, inſiſted that the real eſtate ought not to be charged with this portion, becauſe it was expreſsly directed to be raiſed out of the ſtock and rents of the eſtate during the wife's life. But the court was of opinion, that *in this caſe*, *C.*'s eſtate was charged with the plaintiff's portion, for the ſeveral gradations in his will ſhewed, that the

(*a*) 2 P. Will. 188. (*b*) 1 Vern. 411. 2 Vern. 708. Pre. Ch. 264, 430. Forreſt. 110. 3 P. Will. 91. 2 Veſ. 271, 314. 3 Bro. CC. 347, 3 Veſ. Jun. CC. 545, 738. (*c*) Pre. Ch. 397.

portions were in all events to be made good to his daughters, and therefore he *firſt* charged them on his ſtock, and ſecondly, directed that they ſhould be made good out of the ſurplus of his rents during his wife's life; and laſtly, he deviſed the lands to *C.* ſubject to them, by giving them to him *after his debts and legacies paid, which in a will amounted to a charge on his lands for the payment thereof*, ſince he was not to have the real eſtate before the debts and legacies were paid.

In (*d*) *Trott* v. *Vernon*, the words were, "imprimis, I will and deviſe that all my debts, legacies, and funerals ſhall be paid and ſatisfied in the firſt place," and then the teſtator diſpoſed of his real and perſonal eſtate. The deciſion was the ſame in favour of the charge.

In (*e*) *Alcock* v. *Sparhawk*, the teſtator, in the beginning of his will, deviſed his lands to his heir in fee-ſimple, and then bequeathed ſeveral pecuniary legacies, and appointed his heir executor, *with a direction to ſee his will performed*, and it was adjudged that ſuch deviſe and direction to his heir, amounted to a ſufficient inference of the teſtator's intention to charge the lands in his hands with the payment of legacies.

In (*f*) *Davis* v. *Gardiner*, the introductory words were, "*as to my worldly eſtate*, I diſpoſe of the ſame as follows: after my debts and legacies paid, I give, &c." and the teſtator, after bequeathing ſome legacies, diſpoſed of his reſiduary perſonal eſtate thus. "After all my legacies paid, I give the reſidue of my perſonal eſtate to my ſon." And it was determined upon inference of the teſtator's intention, collected from the circumſtance of his bequeathing a ſuppoſed reſidue, which it turned out he had not, that the legacies were not by the introductory expreſſions, made effectual charges upon the lands.

In *Haſſel* v. *Haſſel* (*g*), the teſtator began his will thus, "As touching and concerning my worldly eſtate, I give, deviſe, and bequeath as follows: Firſt, I give my houſhold goods, &c. to my wife for life. I give, deviſe, and bequeath to *M. H.* 300l. at twenty-one;" and after giving, *deviſing*, and bequeathing other legacies, the teſtator thus proceeded. "I give, deviſe, and bequeath to my ſon *H. H.* all and ſingular my real and perſonal eſtate not herein diſpoſed, to him, his heirs, and aſſigns, and I appoint him overſeer of my will." The four younger children of the teſtator filed a bill for payment of their legacies, and if the perſonal eſtate were inſufficient, to have them raiſed out of the real property. And it was contended on their behalf, that the teſtator having ex-

(*d*) Pre. Ch. 430. 2 Vern. 708. SC. (*e*) 2 Vern. 228. See alſo Lypet *v.* Carter, 1 Veſ. 499. SP. (*f*) 2 P. Will. 187. (*g*) Dickens Rep. 527.

presly declared it to be his will to dispose of *all* his wordly estate, and having, on the giving of the legacies to his children, used the word "devise," which was applicable to real estates only, and having by the residuary clause, given, *devised*, and bequeathed all his *real* and personal estate not thereinbefore disposed of: and having directed the legacies to be paid by his executor, to whom he had given his real estate, it was manifestly his intent and meaning to charge the legacies on the real estate. On the other hand it was argued, that the legacies being money-legacies, were to be paid out of the personal estate; and that the real property not being expresly charged with them, ought to be exempt from contributing towards their payment. But lord *Bathurst*, C, determined that the legacies were a charge on the real estate, upon a deficiency of the personal.—Also

In (*b*) *Austen* v. *Halsey*, Lord *Eldon*, C. decided, that a devise in trust of personal estate, with the savings and accumulations of real and personal estate for the testator's daughters, upon the happening of the events therein mentioned, *after payment of legacies*, was sufficient to create a charge upon the savings of the *real* estate in favour of the legatees, the personalty and its produce being insufficient to pay all.

There is a late determination, which goes the length of recalling a stronger inference of intention to charge the real estate with legacies than with debts. The case is (*i*), *Kightley* v. *Kightley*. The introductory words were: "First, I will and direct, that all my just debts, *legacies*, and funeral expences shall be fully paid and discharged," and then the testator bequeathed legacies, and devised his real estate. It was decreed at the *Rolls*, that the legacies were no charges upon the real estate. The principle which produced the decree seems to have been this. That the discharge of debts is a moral obligation, and binding upon the conscience of the testator, for which reason courts of equity will lay hold of the slightest inferences of an intention to pay them, and effectuate it; but on the contrary, that legacies being purely *voluntary*, the reason which induces the court to relax its rules in favour of creditors, does not apply to legatees. Wherefore, expres words, or a manifest intention must appear, to create a charge on lands for the benefit of legatees.

There seems to be great weight in the distinction taken by the *Master of the Rolls* in the last case, but it must be noticed, that the persons who made their decrees in the prior cases, never mention or hint at any such difference as existing between debts and legacies, it appears, on the contrary, from

(*b*) 6 Ves. Jun. CC. 475. (*i*) 2 Ves. Jun. CC. 328.

thoſe adjudications, that the intention of teſtators was the only thing inquired after, and that very ſlight grounds of inference have been conſidered ſufficient to charge real property with the payment of legacies.—In a ſubſequent caſe of (*k*) *Williams v. Chitty*, Lord *Loughborough* adverted to the principle laid down by the *Maſter of the Rolls* in the above caſe, and ſaid in reference to charges on real eſtates, "that he did not know how to ſtate the difference" between debts and legacies.—Upon the whole, therefore, we may perhaps conclude, that although it might not be unreaſonable that a diſtinction ſhould exiſt between debts and legacies in regard to the degree of inference neceſſary to effect charges upon lands, yet that the majority of the caſes have at preſent fixed the law againſt the prevalence of ſuch a difference.

In caſes where the real eſtate is effectually charged with the payment of debts and legacies, the rule is, that the perſonal eſtate is to be conſidered the firſt and natural fund, out of which they are to be paid, and the real eſtate not to be reſorted to, but in aid only of the former; the court of chancery has in ſeveral of the caſes below ſtated, laid great weight upon the circumſtance of the deviſee of the land, being alſo a legatee of the perſonal eſtate, conſidering as a ſtrong feature of intention, that the teſtator could not mean to exempt the perſonal fund to the prejudice of the real, when *both* were given to the ſame perſon. Thus—

(*l*) *A.* after bequeathing ſeveral legacies, deviſed his real eſtates to truſtees, for the payment of debts, legacies, &c. with which he expreſsly charged ſuch eſtates. He then directed his truſtees to receive the rents of his eſtates until his nephew *T. D.* attained twenty-five, and to allow him thereout 30l. annually, and alſo 20l. *per annum* to *C.* and *D.* until they ſeverally arrived at the ages of twenty-five; the reſidue of the rents, together with the eſtates, *A.* gave to *T. D.* in tail male, with remainder to *C.* and *D.* in tail male ſucceſſively, and bequeathed ſeveral articles as heir-looms to go with the eſtates. *A.* then gave the reſidue of his perſonal eſtate before unbequeathed to *T. D.* and appointed his truſtees executors. *T. D.* having ſurvived the teſtator, but dying at the age of nine years, a queſtion aroſe between his adminiſtratrix and the executors of the teſtator, whether the perſonal eſtate did not belong to her exempt from the teſtator's debts? But the court was of opinion, that the perſonal eſtate was firſt applicable to ſuch purpoſe in eaſe of the real. Firſt, becauſe *there was no expreſs clauſe to exempt* the perſonal eſtate, which was the

(*k*) 3 Veſ. Jun. CC. 551. (*l*) Dolman *v.* Smith, Pre. Ch. 456. alſo Gower *v.* Mead, Ibid. 2. and Bridgman *v.* Dove, 3 Atk. 201. SP.

uſual diſtinction in caſes of exemption; and ſecondly, becauſe it appeared from the circumſtances of the heir of the family, the nephew, not being to have the real eſtates *until twenty-five*, and of his not being allowed more than 30l. a year for maintenance, until the unuſual period of his arriving at twenty-five, which evinced a very frugal intention, that the teſtator could not mean to truſt his nephew without reſtraint, and at any age, with his perſonal eſtate, ſo as to enable him to conſume and ſquander it away. Beſides, that both funds were in this caſe to come into the ſame hands, therefore the teſtator could not with reaſon be preſumed to entertain ſo very frugal an intention in regard to one fund, and not to extend the ſame frugal intention to the other. That if the perſonal eſtate had been given to a ſtranger, the queſtion might have admitted of another conſideration, from the meaning of the words "before unbequeathed:" but in this caſe, they could not. Therefore the *Chancellor* decreed, that the teſtator's perſonal eſtate was firſt applicable to pay his debts and legacies.

(*m*) *B.* deviſed all his lands, &c. in the counties of *W.* and *M.* to truſtees in fee, upon truſt, that they, out of the rents and profits, or by leaſe, mortgage, or ſale thereof, or of ſuch part as they might think fit, ſhould *raiſe ſo much money as would diſcharge all the debts he ſhould owe at his death, and intereſt* for the ſame, and apply the money in ſuch precedency as they thought proper, and after payment of his debts, that they ſhould ſtand ſeiſed of ſuch part of the premiſes as remained unſold, for ſuch perſons as ſhould be intitled to his other ſettled eſtates, and if any money remained after payment of the debts, the ſame ſhould be paid to his daughter, or to ſuch other perſon as ſhould be intitled to his other eſtates. And he gave *all his perſonal eſtate* to his daughter, and appointed her ſole executrix. It was contended, that the daughter ſhould have the perſonal eſtate exempt from the debts, and that the lands deviſed for their payment, ſhould be firſt applied. But by Lord *Talbot*, C. "The perſonal eſtate is the natural fund for payment of debts, and which, as againſt creditors, unleſs they pleaſe, the teſtator cannot exempt: but againſt the deviſee of his land he may by appropriating his land as a fund for payment of his debts; but even in that caſe, according to the general rule, *there ought to be expreſs words* to exempt the perſonal eſtate from the debts, or at leaſt, *words very plainly ſhewing* this to have been the intention of the teſtator. Here he gives the perſonal eſtate to his executors, which is no more than the law does, and is like giving the real eſtate to the heir, which is void. But what I chiefly ground my opinion upon is, that here, the ſame perſon

(*m*) Haſlewood *v.* Pope, 3 P. Will. 324. Ed. by Cox.

is deviſee of the perſonal, and alſo deviſee of the ſurplus of the real eſtate in tail; and I cannot think it was the intention of the teſtator to exempt his perſonal eſtate from his debts, for no other reaſon, but that his daughter might diſpoſe thereof by her will under her age of twenty-one, on purpoſe to leave the real eſtate of the teſtator, and which was ſettled on herſelf in tail, the more incumbered."—Again,

(*n*) *C.* as adminiſtrator to his ſon Lord *Obryan*, filed a bill againſt the defendants for an account of the perſonal eſtate of Lord *Thomond*; or for ſale of ſo much of the real eſtate as was directed to be ſold by his will in 1738, by which he firſt deſired his debts to be paid, and then gave all his real eſtates to truſtees, and ordered them to ſell a competent part of the premiſes, in the firſt place to pay off all his debts and legacies, and then to reimburſe themſelves all charges, and until ſuch ſale, to apply the rents and profits in payment, &c. and after the diſcharge of his debts and legacies, to convey what ſhould remain unſold to Lord *Obryan* in tail male, with remainders over. The teſtator then gave 20,000l. to *W. W.* and directed that the whole money ariſing by ſuch ſale, *ſhould be accounted perſonal eſtate*, and gave all the reſidue of his perſonal eſtate, after payment of his debts and legacies, to Lord *Obryan*. It appeared, that at the time of making the will, the teſtator's perſonal eſtate in money was about 8000l. and in furniture, &c. about 7000l. but at the time of his death, his perſonal eſtate amounted to about 30,000l. and his debts and legacies to 60,000l. One of the queſtions was, whether the perſonal eſtate ought to be applied in the firſt place in payment of debts and legacies, or whether it ſhould be exempt, and the real eſtate firſt applied? And Lord *Hardwicke*, C. "The true queſtion is, whether the teſtator has given what was ſtrictly his perſonal eſtate to Lord *Obryan*, exempt from debts and legacies, and they are charged on the real eſtate? Putting the queſtion the other way, it is tantamount; that is, whether ſo much of the real eſtate is to be ſold as will anſwer all the debts and legacies, and that money ariſing by the ſale be added to the perſonal eſtate, and made one aggregate fund; and then ſo much to be taken out as will pay the debts and legacies, and the reſt to go to Lord *Obryan*, under the bequeſt of the reſidue of the perſonal eſtate? This will depend on the rule eſtabliſhed in the courts of law and equity, and the determinations upon it, and the application of this caſe to that general rule. The general rule of law and equity is, that the perſonal eſtate is the firſt fund for payment of debts; and as to proper legacies it is conſidered as the only fund, both in the eccleſiaſtical, and

(*n*) Lord Inchiquin *v.* French, &c. Ambl. 33.

in this court. If, therefore, the perſonal eſtate is to be exempted from theſe charges, it muſt be ſo expreſſed, or it muſt appear from a plain neceſſary implication ariſing from the words of the teſtator, and in ſuch caſe of an implication or plain intention without expreſs words, it muſt appear that the perſonal eſtate is given as a *ſpecific bequeſt* in ſome ſhape; and beſides, the teſtator muſt have directed another fund to diſcharge them, not that he can take from creditors their right of coming on the perſonal eſtate, but he may charge which fund he will, as between his repreſentatives. There is no ſubſtantial or general difference between the caſes, where, in order to exempt the perſonal eſtate, and charge another fund, a man has directed his real eſtate to be charged with payment of his debts, &c. and where he has directed his eſtate to be ſold for that purpoſe. There are inſtances in both thoſe ways, where the perſonal eſtate has been taken in aid of the real, and where it has been exempt. In the firſt ſetting out of his will, the teſtator had no intention to ſeparate his eſtates, becauſe he deſires to diſpoſe of all his worldly eſtate, and then immediately directs his debts and legacies to be paid, ſo that from thence appears no intention to exempt his perſonal eſtate, but the contrary; though creditors, by thoſe words, would be intitled to come on the real eſtate for ſatisfaction, according to the caſe of *Codrington* v. *Lee*. He next directs a competent part of his real eſtate to be ſold, and the money ariſing by the ſale to be conſidered as perſonal eſtate. It has been inſiſted, that by the directions to pay all his debts, all ſhould be paid out of that particular fund; but the caſe of *Hazlewood* v. *Child*, will govern here, where the words were full as ſtrong, and the court will take it to mean, that ſo much ſhall be raiſed, as with the perſonal eſtate, will be ſufficient to pay debts and legacies; and as an exact ſum cannot be raiſed, the reſidue, if any, ſhall go to Lord *Obryan*. This is the firſt inſtance where a deviſe of a reſidue was inſiſted to be ſo of all the perſonal eſtate, but indeed this will is particularly penned. The next thing inſiſted on is, that the money to be raiſed by ſale is to be competent to pay all the debts and legacies, but there is no caſe where ſuch a clauſe of the reſidue, as in the preſent, is taken otherwiſe than as the reſidue of the proper perſonal eſtate. Can any thing be ſtronger to ſhew his intention, that his perſonal eſtate ſhould be ſubject, when he has made the money ariſing by ſale, to be part of that which is the proper fund for payment of his debts. A difference was attempted, that the money ariſing by the ſale ſhall not be intitled to the privileges of the real eſtate: that is true if ſeparated from it, but the queſtion is, how much is to be raiſed? The great objection made by the plaintiff ariſes from the external circumſtances of Lord *Thomond*. At the

time of making his will, his perſonal eſtate was 15,000l. at the time of his death it was 30,000l. his debts and legacies amounted to 60,000l. It was therefore ſaid, this conſtruction would defeat Lord *Obryan* of any benefit, the debts being more than the perſonal eſtate: but that has received a ſpecial anſwer, that it is not a bequeſt of the perſonal eſtate, but of the *reſidue*, after payment of debts and legacies, and many caſes are to be found, where it was the teſtator's intention, that the legatee ſhould take the reſidue if any ſhould be left. It was improper evidence to be read, what were the circumſtances of Lord *Thomond* at the time of making his will. And in the caſe of ——, Lord *Holt* ſaid rightly, that the court ought not to conſider the circumſtances of the teſtator, to determine what was his intention, and he ſaid not even with reſpect to his real eſtate, which perhaps was going too far, but the perſonal eſtate is always fluctuating. If this court was to go into the evidence, the moſt improbable reaſon has been given on the part of the plaintiff. Can it be imagined that the teſtator would order part of his real eſtate to be ſold in order to give Lord *Obryan* a greater perſonal eſtate, who was under the ſame will, to take the real eſtate, and was at that time a child very young? The conſtruction I have made is agreeable to the expreſs words, and no implication can be to over-rule them, and therefore the perſonal eſtate muſt be firſt applied."

(*o*) *D.* by his will, deviſed as follows. "I will and deſire that my debts and legacies ſhall be paid, and for that purpoſe, I *charge* all my eſtate with the ſame, and that it may be more eaſily done, that Sir *W. W.* and *J. H.* and their heirs, ſhall ſell the eſtate, and apply the money to the payment of debts and legacies, and that it may be lawful for them to pay out of the rents and profits, or to raiſe the money by mortgage," and ſubject thereto, he deviſed the premiſes to the plaintiff for life, with remainders over; he then gave ſeveral pecuniary legacies, and the reſidue to the plaintiff, who filed the bill to compel the truſtees to pay the debts and legacies out of the real eſtate, inſiſting that he took the perſonal exonerated from them. But Lord *Thurlow*, C. ſaid, "I believe it is very clear that here is not enough to exonerate the perſonal eſtate. The perſonal eſtate is the proper fund,—in order to exempt it, the teſtator muſt expreſs his intent. It is not ſufficient to charge the real, but he muſt ſhew that his purpoſe is, that the perſonal ſhould not be applied. The words to be attended to, are thoſe relative to the perſonal eſtate. He gives pecuniary legacies, and then by a very looſe clauſe, gives the reſidue to the plaintiff. I am called upon to conſtrue the moſt large and looſe re-

(*o*) Samwell *v.* Wake, 1 Bro. CC. 144.

ſiduary clauſe that ever was ſeen in ſuch a way as to change the natural order of payment. Where the intent is ſtrongly expreſſed, and it is for near relations old caſes have carried the matter further than good ſenſe, without precedents, would have done; but none of the caſes apply to the preſent. Therefore, the perſonal eſtate muſt be firſt applied to the payment of debts and legacies."

(*p*) *E.* by his will, deviſed as follows: "I give and deviſe to *T. N.* and *J. M.* their executors, adminiſtrators, and aſſigns, all thoſe my manors, lands, &c. in *Lincolnſhire*, to have and to hold to them, from the time of my deceaſe, for the term of ninety-nine years, upon the truſts hereinafter mentioned." He then gave the real eſtate, ſubject to the term, and in default of iſſue of his own body, to *Montague Bertie* for life, remainder to his firſt and other ſons in tail male, remainder to the plaintiff for life; remainder to his firſt and other ſons in tail male, with remainders over, and afterwards declared as follows: "I do hereby declare that the term and eſtate, ſo as aforeſaid limited to them the ſaid *T. N.* and *J. M.* their executors, adminiſtrators, and aſſigns, for ninety-nine years, is upon the ſpecial truſt and confidence, and to the intents and purpoſes following; that is to ſay, upon truſt and confidence, that they, the ſaid *T. N.* and *J. M.* their executors, &c. ſhall, *out of the rents and profits*, or *by mortgage*, *aſſignment*, *or demiſe* of all, or any part of my before mentioned manors, &c. or any of them, for all, or any part of the ſaid term of ninety-nine years, or otherwiſe as to their diſcretion ſhall ſeem meet, levy and raiſe ſo much lawful money of Great Britain as will be ſufficient *to pay and ſatisfy all the debts I ſhall owe at the time of my deceaſe*, my funeral charges, and *all the legacies* and ſums of money given by me in and by this my will, and pay and apply the ſame accordingly. And my will and mind is, that after ſo much money ſhall be raiſed as ſhall anſwer the purpoſes aforeſaid, together with all coſts and charges in or about levying or raiſing thereof, the ſaid term ſhall ceaſe and determine." He then deviſed as follows: "I give and deviſe to my brother *Montague Bertie*, his executors and adminiſtrators, all that the manor of *Eaſt* and *Weſt Deeping*, holden by leaſe from the crown, ſubject to the yearly rent and covenants reſerved in the ſaid leaſe, and alſo ſubject to the mortgage thereon to Mrs. *Mellicent Neate*, of *L.* for 6500*l.*; but in caſe my ſaid brother ſhall not be living at the time of my deceaſe, then I give the ſaid eſtate and premiſes, with the appurtenances (ſubject as aforeſaid) to ſuch perſon as ſhall be intitled to the freehold of my real eſtate at the time of my deceaſe, by virtue

(*p*) Ancaſter *v.* Mayer, 1 Bro. CC. 454.

of the aforeſaid limitations in this my will." And towards the end of his will he deviſed as follows: "Item, I alſo give all my houſhold goods, other goods, chattels, effects, and perſonal eſtate whatſoever and whereſoever, unto my ſaid brother *Montague Bertie*, if he ſhall be living at the time of my death; but in caſe he ſhall be then dead, I give and deviſe the ſame to ſuch perſon as ſhall be intitled to the freehold of my real eſtate, under and by virtue of the limitations in this my will. Provided always, and I do hereby declare my mind and will to be, that in caſe I ſhall at the time of my death leave iſſue of my own body, that then and in ſuch caſe, as well all and every the before mentioned uſes, deviſes, and limitations, to my ſaid brother *Montague Bertie*, the duke of *Ancaſter*, and their reſpective heirs, and alſo the deviſe of the reſidue of my perſonal eſtate ſhall be utterly void; and in ſuch caſe I do hereby will, and my mind is, that all my real eſtate, ſubject to the ſaid term of ninety-nine years, ſhall deſcend according to the rules of law, and that the reſidue of my perſonal eſtate ſhall go and be diſtributed in ſuch manner, and to and among ſuch perſons as if I had died inteſtate; and I do hereby appoint the ſaid *T. N.* and *J. M.* executors of this my laſt will; and I do hereby will, order, direct, and appoint that my ſaid executors, and the ſurvivor of them, ſhall and do pay, ſatisfy, and diſcharge my funeral charges and *all my debts and legacies*, ſo ſoon as they ſhall become due and payable, by ſuch methods, ways and means, and in ſuch manner as he or they, or their counſel, ſhall in that behalf adviſe and think meet; and it ſhall and may be lawful to my ſaid executors, or either of them, to deduct and ſatisfy to him or themſelves out of my perſonal eſtate, or out of the money to be raiſed out of the ſaid term of ninety-nine years before to them deviſed, all ſuch diſburſements, expences, and charges, which they or either of them ſhall be put to in proving this my will, or by any other ways or means whatſoever, in or about the execution of this my will," &c." *Montague Bertie* died in the life of the teſtator, and the plaintiff became intitled to the real eſtate under the limitations of the will. The leaſehold eſtate had been ſeveral years before mortgaged by the teſtator's father for 6,500l. to Mrs. *Neate*, and in 1765, the mortgage was aſſigned by the deſire of the teſtator to *T. P.* who advanced him a further ſum of 100l. upon it, and the teſtator conveyed other eſtates as an additional ſecurity for the 6,600l. Two of the queſtions were, whether the perſonal eſtate was exonerated from the debts? and whether the leaſehold eſtate was liable to pay the mortgage debt for which it was ſecurity? *Aſhurſt* and *Hotham*, lords commiſſioners, were of opinion that the perſonal eſtate was exempt from the payment of debts, and that the mortgage was to be paid out of the

term created for diſcharging debts and legacies. This opinion not being acquieſced in, the cauſe was reheard by Lord *Thurlow*, C. who pronounced judgment to the following effect: "Whether the perſonal eſtate ſhould be liable, in the firſt inſtance, in exoneration of the real, to the payment of debts in wills of this kind, upon looking into the caſes, I find to be a point ſo ſlender and fine, that I cannot collect any certainty upon the queſtion; but ſo much uncertainty abounds, that could the will of a teſtator be referred to a number of lawyers, they would probably entertain a diverſity of opinions upon it. The point ought to be fixed, and in order to make it ſo, I take it the *rules* have been theſe, and ſhould be adhered to. In the firſt place, that the *perſonal* eſtate is liable in the *firſt inſtance* to the payment of the debts, but in exception to this, it is agreed that the teſtator may if he pleaſes, give his perſonal eſtate, as againſt his heir, or any other repreſentative, clear of the payment of his debts, and then it becomes a queſtion, what is the mode of expreſſion to give the perſonal eſtate *exempt* from ſuch payment, when the rule of law is, that ſuch eſtate is firſt liable. Perhaps it might not have been unwiſe to have adopted the rule laid down in *Fereges* v. *Robinſon*, Bunb. 301. that the teſtator muſt uſe *expreſs words* for that purpoſe, but it is impoſſible to abide by the opinion given in that caſe conſiſtently with the rules in other caſes. The ſecond rule is, that where there is a *declaration plain*, that ſhall ſtand in lieu of expreſs words: this rule has been laid down ſo long, and acted upon ſo conſtantly, that if other judges were to put the conſtruction of wills upon other grounds, how wiſe ſoever it might have been originally, it would be very unwiſe to make the adminiſtration of juſtice take a courſe contrary to former rules. Therefore if there be a *declaration plain*, or *manifeſtation clear*, ſo that it is apparent upon the face of the will, that there is ſuch a plain intention, the rule then is, not to diſappoint, but to carry ſuch intent into execution. But ſhould not ſuch intention manifeſtly appear, there is not a ſingle caſe which does not take it for granted, that the perſonal eſtate is by law the firſt fund for the payment of debts. In regard to the general intention of the will of *E.*; the teſtator was ſeiſed of a real eſtate, which he had in his contemplation (excluſive of the idea of his own children) and wiſhed to leave it to other lines of the family of *Bertie*, and conſequently deviſed it to *Montague Bertie*, with remainder over to *P. Bertie*, for life, &c. So far in reſpect of the real eſtate, his intention was to fix it in the name and blood of the family. The next object he had in view was a leaſehold eſtate, which he held under the crown; that eſtate was a chattel intereſt, and with regard to that, he does not ſhew ſuch a wiſh to fix and continue that eſtate in the

line of *Bertie*. His apparent wiſh was not ſo ſtrong, as in reſpect to the diſpoſal of his real eſtate; for had it been ſo, though he could not have created an intail of this leaſehold eſtate, with limitations over, yet he might have prevented the firſt taker of it from aleniating it. Had the teſtator been aſked the queſtion, whether he meant that this part of his eſtate ſhould be ſubject to the mortgage, or to give it *entire* to the firſt taker of the real eſtate, or to charge the term of ninety-nine years, in exoneration of the other eſtate, this might have been a very doubtful queſtion and merely conjectural, though perhaps he might have anſwered, that that eſtate ſhould pay the debts, but whatever his intention was, he has poſitively given it, ſubject to the payment of the debt; therefore, if another eſtate had been appropriated to payment of his debts, and this had been *his* debt upon the eſtate; I ſhould have concurred with the lords commiſſioners: but in following them in that courſe, in which they conſidered it, as being the clear intention in the mind of the teſtator, that the real eſtate ſhould be ſo appropriated, I rather think otherwiſe; for it appears to me, as if the teſtator wiſhed it ſhould not, and choſe that the leaſehold eſtate ſhould be ſo appropriated, rather than to have burthened the real eſtate. For the mode of limiting the eſtate to *Montague Bertie* for life, implies the intention of giving him a *perſonal bounty*; but in caſe of failure of iſſue, he gives it to the next heir who ſhould come into poſſeſſion, &c. Had the real eſtate been expreſsly charged with payment of the debts, or the teſtator ſhewn an anxious intention to have ſacrificed his real eſtate in preference to the leaſehold or his other eſtate for that purpoſe, by the mode of diſpoſing of his eſtates, ſuch a circumſtance might have been ſufficient to have turned the rule of law, and it muſt have been appropriated to the payment of debts, let him have charged it in any manner he pleaſed. When the teſtator purchaſed this leaſehold eſtate, he purchaſed the equity of redemption, and the mortgage was to be conſidered merely as a real incumbrance upon the eſtate itſelf, and *not a perſonal debt*, as againſt the purchaſer, according to the rules of this court, and caſes decided. For if a man purchaſes an equity of redemption ſubject to incumbrances, that ſhall be a real incumbrance following the land, and *not a perſonal* one." His lordſhip continued to ſtate his reaſons at length why the eſtate in mortgage ſhould alone diſcharge the debt fixed upon it, and then proceeded thus as to the general debts. "It is a fixed rule that the perſonal eſtate muſt be firſt liable unleſs another fund is provided; the teſtator *muſt expreſs his intention to diſcharge* that eſtate from the payment of debts. With regard to the intention apparent upon this will, it is ſaid ſuch intention is moſt anxiouſly limited to

the raiſing of the term of ninety-nine years. Whether the expreſſion be more or leſs, it is but ſubjecting the eſtate to the payment of debts, and it cannot extend ſo far as to ſuppoſe he burthened his real eſtate in exoneration of the perſonal. If there had been in the gift of the perſonal eſtate, words of ſufficient force, according to my notion of a declaration plain, I ſhould not have changed the force of thoſe words, but the intent of theſe words as they ſtand, naturally leads to ſubject the perſonal eſtate to the debts. With reſpect to the ſecond clauſe, had that ſtood alone, I conſeſs that would have been liable *to a degree of inference*; but conſtructions thus picked up and collected from more circumſtances than are neceſſary for the purpoſe, are not good ways of finding out the intention of the teſtator, and it is better to reſt upon ſettled rules, unleſs you can collect more favourable and forcible obſervations. With regard to the next clauſe, that carries more weight, becauſe the truſtees are directed to pay, not only the expence of the probate of the will, which is expreſsly mentioned; but to pay all the charges and expences that ſhould ariſe by proving the will, or by any other means, &c. How are theſe to be paid? out of the perſonal eſtate? or the means to be raiſed out of the term of ninety-nine years? They have authority to pay the whole out of the perſonal eſtate: an optional clauſe, and empowering the executors to pay out of this fund, before the other fund is ready for the purpoſe. He has arranged the eſtates preciſely in the ſame order that the law would have done; he has made his perſonal eſtate firſt liable, and then the term. The true ground upon which I proceed, is not upon any of theſe criticiſms, but ſimply upon the rule of law, *the teſtator not having declared by expreſs words or any other declaration, which would tend in law, to the purpoſe of preſerving the perſonal eſtate for any given purpoſe whatever.* As to *Adams* v. *Meyrick*, Eq. Ca. Abr. 271. that depended upon the circumſtance of the perſonal eſtate being a proviſion for the wife, and therefore the court forced a conſtruction upon the will, and it is, as Lord *Hardwicke* termed it, in *Walker* v. *Jackſon*, 3 Atk. 624. a weak caſe: in the latter caſe, the republication of the will was an argument much relied upon. As to the caſes determined upon the words "reſt and reſidue," I could have wiſhed his lordſhip had decided upon them all, ſo as to have left a particular note upon each of them; for ſuch determinations as thoſe caſes afford, have occaſioned great perplexity upon the rule of law. As to *Stapleton* v. *Colville*, Forreſt. 202. in that caſe the wife was executrix, and excluſive of the context of the will, with regard to the option given to her to charge either fund, there never was a ſtronger caſe, againſt charging the real eſtate, for he gives the whole real eſtate to the wife,

and to be charged with debts; he wiſhes the continuance in his name and family, and yet charges it with the payment of the debts. Lord *Talbot* obſerved, much might ariſe from the examination as to the *quantum* of the debts, and the amount of the perſonal eſtate. Lord *Talbot* took it as clear, that ſuch an examination could be gone into. In *Stephenſon* v. *Heathcote*, it is ſaid expreſsly, no examination can be had. In that caſe, lord keeper *Henley* relied much upon the wife being executrix. The caſe was this: 'The teſtator gave all his real eſtate to *R.* and his wife for ever, with a charge thereon for payment of debts; and after diſpoſing of other property, he gave a ſilver tobacco box to his uncle, and all the *reſidue* to his wife for ever, whom he appointed ſole executrix. The lord keeper's obſervation upon this caſe was, that the intent of the teſtator was to be collected from the words of the will, and from no circumſtances out of it, and upon general rules and principles eſtabliſhed in the caſes, that the court could not go into the teſtator's circumſtances, as it would eſtabliſh a rule not to be adhered to (*q*). The teſtator intended to charge his perſonal eſtate with payment of his debts, and only made his real eſtate an *auxiliary* fund. According to the rule of law, where the intent of the teſtator is plain, or words, tantamount to expreſs words, that is ſufficient to take it out of the rule: and that it could not be the intention; for the laſt clauſe of giving the ſilver tobacco-box, and then the reſidue to his wife, was not ſufficient to ſhew his intention to give the reſidue free from debts, but that the primary fund ſhould be liable.' In the preſent caſe I am obliged to differ from the Lords Commiſſioners, and conſider the whole perſonal eſtate as liable to the payment of the debts. And with reſpect to the leaſehold eſtate, that the charge under which it came to the teſtator, was prior to his purchaſing it, and inherent in the eſtate, and the eſtate itſelf left liable to anſwer it, and that neither the perſonal eſtate, nor real eſtate ought to be charged with that debt."

(*r*) *F.* deviſed to truſtees *J. B.* and *W. M.* his dwelling-houſe, &c. ſituate in *Caſtle-Gate*, in *New Malton*, and then proceeded, "and alſo all my lands, hereditaments, and premiſes, which I myſelf purchaſed, not thoſe which I and my mother purchaſed of *James Hebblethwaite*, ſituate in *Norton*, in the ſaid county of *York*, and alſo all the tithe eſtate ſituate in *Norton* aforeſaid, which I alſo lately purchaſed of the ſaid *James Hebblethwaite*, upon truſt, that they, the ſaid *J. B.* and *W. M.* or the ſurvivor of them, or the heirs of ſuch ſurvivor, ſhall and do as ſoon after my deceaſe as conveniently may be, make ſale thereof for the beſt price or prices, that can reaſon-

(*q*) See the laſt caſe. (*r*) Gray *v.* Minnethorpe, 3 Veſ. Jun. CC. 103.

ably be had for the ſame; and out of the monies ariſing by ſuch ſale or ſales, pay all my juſt debts and funeral expences, and then put and place out at intereſt all the reſidue of the ſaid monies, and pay the intereſt to grow due for the ſame, unto my brother *George Simpkin*, for and during his natural life, and after his deceaſe, to pay the ſaid principal money unto and among my nephews and nieces hereinafter named, and in ſuch proportions as hereinafter mentioned," viz. to each nephew and niece 50l. a-piece, and the reſidue of the money to his nephew *J. Gray*. The teſtator gave another real eſtate to *G. Simpkin* in tail, and made him executor. The truſt eſtate being ſold by the truſtees, and applied in payment of the teſtator's debts, the whole purchaſe money was exhauſted. The nephews and nieces therefore filed their bill, inſiſting that the perſonal eſtate was liable, and ought to have been in the firſt place applied in diſcharging the debts, and that the latter eſtate ought to refund what had been paid out of the real, in diſcharge of ſuch debts. And Lord *Loughborough*, C. "The court is bound to give effect to all the will. It is very clear, the teſtator meant by the ſale of the real eſtate to provide a fund for his debts. It is equally clear he ſuppoſed there might be a reſidue, of which he diſpoſes, and then after anſwering all theſe payments, he ſuppoſes there will be ſtill a reſidue, and gives that to another perſon. Then as to the perſonal eſtate, there is no mention of it in the will, except the mere nomination of an executor. No caſe comes up to that, that the mere nomination of an executor, though under circumſtances that would give to him beneficially the perſonal eſtate, and not make it diſtributable to the next of kin, ſhall have the ſame effect, as a diſtinct ſpecific gift of it to an individual, as there was in *Bamfield* v. *Wyndham*, Pre. Ch. 101—451. and *Wainwright* v. *Bendloes*, 2 Vern. 718. And it would be a ſtrong concluſion, when the effect would be to defeat thoſe gifts, the teſtator has clearly intended to make, if there ſhould be a fund out of the produce of the ſale of his real eſtate. They are not ſtrictly legacies, but they are certainly in the nature of legacies, and the defendants conſtruction would in effect give to a perſon only nominated executor, a right to all the perſonal eſtate in oppoſition to thoſe perſons who are intitled to thoſe ſums by the will. Therefore I have no difficulty in holding, that the perſonal eſtate, not particularly given to any one, but merely attached to the perſon of the executor, ſhall be liable in the firſt place. The coſts muſt come out of the fund, and the reſidue, after paying the coſts and the ſeveral ſums of 50l. muſt be paid over to the nephew *J. Gray*."

(s) *G.* deviſed all his manors, &c. and all his real eſtate

(s) Brummel *v.* Prothero, 3 Veſ. Jun. CC. 111.

unto *Thomas Prothero* and his heirs in truſt, in the firſt place to pay all his juſt debts, and then in truſt that his mother *Mary M'Namara*, ſhould after his deceaſe receive out of his ſaid manors, &c. an annuity or rent charge of 120l. and that his four ſiſters of the half blood then living, and their aſſigns, ſhould, from and immediately after the deceaſe of the ſurvivor of him and his mother, during their reſpective natural lives, receive out of the ſaid manors, &c. an annuity or rent charge of 200l. in equal ſhares and proportions, with power to his mother and ſiſters to enter and diſtrain, and take the rents, &c. And as to the ſaid manors, &c. from and immediately after his deceaſe, charged and chargeable with the payment of the ſaid annuities or rent charges of 120l. and 200l. as aforeſaid, and ſubject thereto, and to the means and remedies thereinbefore provided for the recovery thereof, to the uſe of his brother *Edward Blewitt* and his iſſue in ſtrict ſettlement; remainder to the uſe of his half brothers *John* and *Michael M'Namara*, and their iſſue ſucceſſively in the ſame manner; remainder to the uſe of his ſaid ſiſters and their heirs, as tenants in common; and he directed his ſaid brothers of the half blood and their iſſue, when in poſſeſſion, to take the name of *Blewitt*. Laſtly, he gave and bequeathed unto his brother *Edward Blewitt* all his monies, goods, chattels, rights, credits, perſonal eſtate and effects, whatſoever and whereſoever; and he appointed his ſaid brother ſole executor. The queſtion was, whether the real or perſonal eſtate ſhould be firſt applied in diſcharge of the debts, the executor and reſiduary legatee claiming the perſonal exempt from them. And by the *Maſter of the Rolls*, "My determination in this caſe is directly the reverſe of the laſt, *Burton v. Knowlton* (*t*), for I am clearly of opinion, it is not ſufficient to exempt the perſonal eſtate from the debts. I have looked very attentively at the will, that the party ſhould not think it a hard determination, becauſe different from the laſt. There is a very wide difference between the two caſes. This is ſtripped of every circumſtance except that of a deviſe to a truſtee for payment of debts, and a general bequeſt of the perſonal eſtate to the executor. There is no one caſe ſince *French v. Chicheſter*, 1 Bro. Parl. Ca. 192, the firſt upon the ſubject, in which ſuch words as theſe have been alone ſufficient to exempt the perſonal eſtate. It has been over and over again decided, that ſuch words are not ſufficient to raiſe ſuch a demonſtration, as Lord *Thurlow* ſays is neceſſary (*u*)."

(*x*) By indentures of leaſe and releaſe, dated in *October*, 1787, ſeveral real eſtates in the county of *Denbigh*, of which *R.*

(*t*) *Infrà*. (*u*) Ancaſter *v.* Mayer, *ſupra*. (*x*) Tait *v.* Lord Northwick, 4 Veſ. Jun, CC. 816.

Middleton was ſeiſed in fee, and other eſtates in the ſame county, which were in ſettlement, were conveyed to truſtees for the payment of debts, and ſubject thereto to the uſe of *R. Middleton* for life, remainder to truſtees to preſerve, &c. remainder, ſubject to a term for ſecuring a jointure and portions, to the joint appointment of *R. Middleton* and his ſon, and in default thereof to the appointment of the ſon, if the ſurvivor, and for want of appointment to the ſon in tail male, with remainders over. *R. Middleton* the ſon, having ſurvived his father, and no joint appointment having been executed; by his will, reciting his power of appointment, and that he had borrowed ſeveral ſums of money upon his bond and otherwiſe, and that he was alſo indebted to various perſons by ſimple contract, and that he had ſince the conveyance of October, 1787, purchaſed eſtates in *Denbigh*, and had taken up money upon mortgage or otherwiſe, for payment of the purchaſe money; and alſo reciting that he was deſirous of making proviſion as well for the payment of the money borrowed for the purchaſe of the ſaid eſtates, and all intereſt and arrears of intereſt, as of all ſuch other debts as he ſhould owe at his death, not already provided for by the ſaid indentures, and alſo to ſettle the ſaid purchaſed eſtates to the ſame uſes as the lands compriſed in the conveyance of *October*, 1787, he deviſed all the manors, &c. ſo purchaſed, or agreed to be purchaſed, to the uſe of Lord *Kenyon*, Lord *Northwick*, Sir *W. P.* and *W. L.* upon the like truſts, &c. and ſubject to the like powers, &c. as the eſtates compriſed in the ſaid conveyance, did thereby, or by his will and the directions, &c. therein after contained, ſhould ſtand limited or appointed; and in purſuance of his ſaid power he appointed that the eſtates thereby conveyed to the truſtees or ſuch parts thereof as ſhould not be ſold under the indentures, and the equity of redemption of ſuch parts as ſhould then or thereafter be mortgaged, (ſubject to the truſts of the ſaid indentures for payment of the debts, &c.) ſhould, together with the premiſes purchaſed by the teſtator and deviſed by him, continue to the uſe of, and be veſted in the truſtees in truſt, by ſale, mortgage, or otherwiſe, to raiſe a ſufficient ſum of money to pay the ſeveral ſums of money borrowed or advanced by Sir *W. P.* as therein mentioned, and all ſuch other debts as the teſtator ſhould owe at his death, with the intereſt thereof, and out of the rents to pay the intereſt of ſuch ſums of money as ſhould be borrowed, and retain ſo much of the clear reſidue of the rents in their diſcretion, to be applied in reducing the principal of the debts. And he declared and appointed, that after payment of the ſaid ſeveral debts, as alſo of ſuch ſums of money as ſhould be ſo borrowed and the intereſt, and the coſts of executing the truſts, the truſtees ſhould convey all, or ſuch parts of the ſaid eſtates as ſhould not

have been ſold, and the equity of redemption of ſuch parts as ſhould have been mortgaged to and upon the uſes and truſts by the ſaid indentures declared and limited of the eſtates compriſed therein after payment of the debts, &c. thereby directed to be paid thereout. And after giving each of his truſtees a legacy of 100l. he gave the reſidue of his perſonal eſtate to his ſiſters *C. M.* and *M. M.* equally, and appointed Lord *Northwick* and Sir *W. P.* executors: queſtion, whether the perſonal eſtate was exempt from the payment of debts in favour of the ſiſters the reſiduary legatees? And Lord *Loughborough*, C. "I did not think there had been any caſe ſo near the argument contended for by the two ſiſters as *Burton* v. *Knowlton* (*y*). But I confeſs I had held a firm opinion, that the doctrine is exactly as it was laid down in the Duke of *Ancaſter* v. *Mayer* (*z*); I take the rule at preſent to be, that the perſonal eſtate is the natural fund; that againſt the charges naturally thrown upon the perſonal eſtate, you may ſhew a diſtinct exemption: or from the whole will you may collect, that there is an intention expreſſed in the will (I do not mean in *totidem verbis*) that the perſonal eſtate ſhall be exempt. Then *charging* the real eſtate ever ſo anxiouſly for payment of debts, will not of itſelf be ſufficient to exempt the perſonal eſtate. I ſet the whole doctrine afloat, if the argument for the two ſiſters upon this will is allowed to prevail, for it only comes to this. There are two circumſtances; one, that there is a gift of the reſidue of the perſonal eſtate: another, that there is a very anxious charge of debts upon the real eſtate; beyond that I have no ground to ſtand upon. All the reſt of the circumſtances are merely conjectural, upon a ſuppoſed intention; and it is aſked, what could the teſtator mean by giving theſe ſiſters his perſonal eſtate, if they get nothing by it. All I ſay to that is, that a man giving the reſidue of his perſonal eſtate, does not in general mean much, it is as it may happen." Decree againſt the exemption of the perſonal eſtate.

(*a*) *H.* by his will directed that all his juſt debts, funeral and teſtamentary expences ſhould in the firſt place be fully paid and ſatisfied. He then gave to his wife all his houſehold goods and furniture of houſehold, plate, &c. in, upon, and about his two houſes at *I.* and *R.* He alſo gave her all ſuch ſums of money, benefit, right, and intereſt, which ſhould become due from the amicable ſociety for perpetual aſſurance of *Serjeant's Inn*. He gave and bequeathed all his meſſuages, lands, &c. and alſo all his money in the funds, to *William Hartley* and *Henry Hurle*, upon truſt, out of the rents and profits of his meſ-

(*y*) See the next caſe. (*z*) *Supra*. (*a*) Hartley v. Hurle, 5 Ves. Jun. CC. 540.

ſuages, lands, &c. and the dividends of his money in the funds, to pay his debts, funeral and teſtamentary expences, and the ſeveral legacies or ſums of money thereinafter mentioned, viz. to his wife, 150l. immediately after his death; to *Henry Hurle*, 100l. for the trouble he might have in the execution of the truſts of the will. The teſtator then gave ſeveral other legacies which he directed to be paid within twelve months next after his death, or ſooner, at the diſcretion of his truſtees. He alſo directed his truſtees, out of the rents and profits of his meſſuages, lands, &c. and the dividends of his money in the funds, to pay an annuity of 300l. to his wife for life, and the reſidue of the rents, profits, and dividends, into the proper hands of his daughter, *Ann Hartley*, until his grand-daughter, *Ann*, ſhould attain 21, or be married, and ſo ſoon as ſhe attained that age or was married, upon truſt, out of the rents, profits, and dividends as aforeſaid, to pay his ſaid grand-daughter an annuity of 300l. for life, and to pay the ſurplus of the rents, profits, and dividends, into the hands of his daughter for life; and after her death he gave and bequeathed his ſaid meſſuages, lands, and money in the funds, and the dividends and proceeds then due from the ſame, and all his eſtate and intereſt therein, unto and to the uſe of his grand-daughter abſolutely, provided that if ſhe ſhould not at the death of his daughter have attained 21, or be married, his truſtees ſhould continue to receive the rents, profits, and dividends, for her uſe and benefit, until ſhe attained that age or married. The teſtator, after declaring that his leaſehold eſtates ſhould not be ſold, gave the reſidue of his real and perſonal eſtate unto his daughter abſolutely, and appointed *William Hartley*, his daughter *Ann Hartley*, and *Henry Hurle*, executors. The queſtion was, whether the daughter and reſiduary legatee was intitled to the perſonal eſtate exonerated from the debts? And the *Maſter of the Rolls* gave the following judgement;—"The only queſtion that remains in this cauſe, is, whether the perſonal eſtate given to the daughter of the teſtator is exempted from the payment of his debts. The effect of the will is, that, after a general direction that the debts and funeral and teſtamentary expences ſhall be paid, which I conſider as a direction to his executors to pay them, the perſons who take the perſonal eſtate, and which operates as a truſt upon them to pay thoſe debts, he gives certain parts of his perſonal eſtate to his wife. He then creates a fund, which he veſts in two truſtees, who are two of his executors for the purpoſe of doing what he had in the outſet directed to be done, to pay his debts and funeral and teſtamentary expences, and not only thoſe but likewiſe his legacies. The legacies therefore are without all doubt charged only on this fund. The fund thus created con-

ſiſted of the teſtator's real eſtate and a part of his perſonal eſtate. After creating this fund he gives the annual produce of it, ſubject to the debts, legacies and annuities, to his daughter, as I conceive, to her ſole and ſeparate uſe. The direction is to pay *into her proper hands*. After her deceaſe, the truſt is declared for his grand-daughter at 21, or marriage, and then follows the reſiduary clauſe. It was contended that this is a ſpecific gift of the perſonal eſtate undiſpoſed of, to his daughter exempt from the payment of his debts. Whatever might have been my opinion upon this caſe before the caſe of *Tait* v. Lord *Northwick*, 4 Veſ. Jun. 816 (*b*), I muſt now be extremely cautious before I proceed to decide upon this point beyond the caſe of *Burton* v. *Knowlton*; for it is extremely clear, the noble Lord who decided *Tait* v. Lord *Northwick*, intimated a ſtrong doubt of the propriety of my determination. I have had occaſion, and have taken great pains to conſider that caſe very fully ſince this was argued laſt night, and I think if I were to decide it again, I ſhould ſtill be of the ſame opinion. But there are many diſtinctions between that caſe and this: Firſt, in that the will does not ſet out with any direction for the payment of the debts. The teſtatrix begins with a deviſe to truſtees in truſt to pay all the debts and funeral expences, and after having ſo done and having diſpoſed of the ſurplus of that fund, and of part of her perſonal eſtate, ſhe gives to her executor, but not in truſt for himſelf, but for ſuch uſes as ſhe ſhould appoint the reſidue of her perſonal eſtate not before ſpecifically diſpoſed of, and for default of appointment, to him for his own uſe and benefit. The reſiduary clauſe in this will is not a ſpecific gift at all, except with reference to what is before given. It is not merely perſonal eſtate, but the reſt and reſidue of his real and perſonal eſtate not otherwiſe given; whereas he had given all his real eſtate before in truſt for the payment of his debts; and I muſt admit his funeral and teſtamentary expences are included. It is impoſſible to ſuppoſe it any thing more than a gift of what was not before given; not as a ſpecific bequeſt, but of what might have been omitted; not to the ſeparate uſe of his daughter, but to her generally; not to be paid into her proper hands. So it appears to be, that after a general direction for the payment of his debts and funeral and teſtamentary expences, he gives all his real eſtates and a conſiderable part of his perſonal eſtate, his money in the funds, to truſtees, for the payment of his debts, &c. and then makes this general reſiduary diſpoſition. However I may be more liberal than others in conſtruing a will in favour of the legatee of the perſonal eſtate, and nine

(*b*) *Supra.*

times in ten I really believe upon such gifts, the court by its rules has violated the intention, yet whatever may be my own idea upon it, I will not set that up against the rules that have been laid down by great men; and from all the cases, the Duke of *Ancaster* v. *Mayer* (*c*), and all the others, I find that unless there is a necessary implication, the personal estate shall not be exempt. I have before had occasion to comment upon the sort of implication. It cannot be an irresistible inference, but that inference which leaves no doubt upon the mind of the person to decide. But I find no case, as has been fairly admitted, in which the testator after beginning with a direction for the payment of the debts and funeral expences, which naturally fall upon the personal estate, and are to be paid by the executors, has created a fund for his debts and funeral expences, and then given the residue by such words, (for it is not given to the separate use of his daughter) and it has been held that he meant that trust fund as any thing more than auxiliary, if the personal estate should be deficient; and with that impression I am not at liberty to decide in favour of the residuary legatee, as to the exemption of the subject of that residuary disposition, which I consider as only general words thrown in, perhaps without any definite intention. Therefore with some reluctance, but bound down by the authorities, I decide, that there is not sufficient in this residuary disposition to exempt it from the payment of the debts."

(*d*) *J.* by his will after the usual introduction, as to being of sound mind, &c. appointed his wife, *Ann*, guardian to his only daughter, an infant about four months old, and confirmed the settlement made upon their marriage in all respects. The will then proceeded thus: "But should I die soon, in which case there may belong minority of my daughter, and to obviate any difficulty that may arise in my affairs upon that account, I give and devise to my worthy friends and trustees, *R. P.* and *F. W.* all and singular my manors, messuages, tithes, lands, and hereditaments, within the said county of *H.* which are not included in my said settlement, or have not since been purchased by me, and the equity of redemption of and in the same respectively; to hold to the use and behoof of them, their heirs and assigns in trust, nevertheless to sell and absolutely dispose of the same, or such part and parts thereof, as they shall judge most convenient to part with, (with power in the mean time to pay off the mortgage now affecting the same; and for that purpose to take up money, and confine or restrain such new mortgage to such parts of the premises, which are not intended to be disposed of, and which will be

(*c*) *Supra.* (*d*) Brydges v. Phillips, 6 Ves. Jun. CC. 567.

very ample to anſwer both purpoſes) and by and with the money ariſing thereby, in the firſt place to pay off and diſcharge all my juſt debts (except the ſaid mortgage of my ſaid eſtate, and a charge of 4000l. to my two ſiſters, *Ann* and *Catherine*; which by my ſaid ſettlement are provided for, and directed to be paid out of another fund:) and in the next place to raiſe and pay to my half-ſiſter, *Elizabeth Creighton Brydges*, now living with my father at *Madley*, the ſum of 1000l. to carry lawful intereſt from the day of the death of my ſaid father, unleſs I ſhall in my life-time, and which I fully intend doing, make as large and ample a proviſion for her in ſome other way; and in the laſt place to raiſe and pay to my ſaid dear wife, the ſum of 4000l. for her own uſe and benefit; and the reſt and reſidue of my ſaid unſettled eſtates, as alſo all other my manors, meſſuages, lands, tithes, and hereditaments whatſoever, both freehold, leaſehold, and copyhold, which were ſo ſettled upon my marriage, in caſe I ſhall die without iſſue male, either born in my life-time or after my deceaſe, I give, deviſe, and bequeath to my ſaid dear wife, for the term of her natural life; and from and immediately after her deceaſe, to the uſe of my ſaid dear daughter *Ann*, and the heirs of her body lawfully to be begotten; and in default of ſuch iſſue, to the uſe of my ſaid two ſiſters, *Ann* and *Catherine*, and their reſpective heirs, as co-parceners, and not as joint tenants." The teſtator then directed, that if he died without iſſue male, and his daughter ſhould ſucceed to his eſtates, any huſband ſhe might marry, ſhould take the ſurname of *Brydges*, and tranſmit the ſame to his poſterity, being the iſſue or deſcendants of his daughter; and he then proceeded as follows:—"And I farther direct that all the plate, linen, &c. at *Tiberton* aforeſaid, ſhall remain there as and in the nature of heir-looms for the uſe of my ſaid daughter, or ſuch other perſon and perſons who may take or inherit my ſaid eſtates, under and by virtue of the ſaid ſettlement, this my will, or either of them. I give and continue to my ſaid father for his life, the poſſeſſion of the houſe he now inhabits at *Madley* aforeſaid, and of the ſeveral lands thereto belonging and now in his poſſeſſion, together with the annuity or allowance of 80l. a year, which I have hitherto made him, which I deſire he may enjoy, and have the ſame paid him regularly as uſual, during his life; and which I hereby *charge* upon all and every part of my ſaid unſettled eſtates." The teſtator after giving legacies to his ſervants, and 100l. to each of his truſtees for their trouble, concluded thus—"All which ſaid laſt mentioned legacies I deſire may be paid out of my perſonal eſtate (except that part given as aforeſaid for heir-looms;) and all the reſt and reſidue of my ſaid perſonal eſtate (except as aforeſaid) I give and be-

queath to my ſaid dear wife, whom together with my ſaid truſtees, I appoint executors of this my will." The queſtion was, whether the widow was intitled to the perſonal eſtate exempt from the debts? And by the *Maſter of the Rolls*, "There is certainly room for conjecture, that this teſtator did mean to throw the whole of the debts upon his real eſtate. But it is only a probable conjecture; there is no certainty, no clear unambiguous intention to be collected from the whole will, that he meant that; and there is no diſtinct difference between this caſe and *Tait* v. Lord *Northwick* (*e*). Very ſmall differences may be pointed out, but ſuch as would form no guide for other caſes, and leading to puzzle and confuſe rather than to give aſſiſtance to thoſe who may be called upon to adviſe, as to the conſtruction or frame of wills. There is in this as in many caſes, a very diſtinct proviſion for the payment of all the teſtator's debts by the ſale of real eſtates. There is no proviſion for the payment of the funeral expences. I think the omiſſion of that has had full as much weight in ſome of the late caſes as is due to it. Perhaps it is true as has been ſtated from Lord *Hardwicke*, that it is more a phraſe of form than indicating a ſettled intention, and that either the inſertion or omiſſion of it means little (*f*). But it is argued, that wherever the perſonal eſtate is taken to be exempted, either the whole perſonal eſtate, or the reſidue after charges, it is taken as a ſpecific legacy; and if it is once broken in upon, how is it liable to one charge and not to another. You oppoſe the conſtruction, that it is ſubject only to particular legacies, by ſhewing there is ſomething elſe that muſt come out of it. In that way the argument is applied from the omiſſion to provide for funeral expences; and that is the only way in which it has application; for I do not think there is much inference from it as to the intention. This teſtator then proceeds to give particular legacies out of the real eſtate; and it is ſaid it is clear, thoſe legacies muſt come out of that and no other fund. True, for they have no exiſtence but by the will, and muſt come out of the fund the teſtator points out. But the debts have a ſeparate and independent exiſtence. He then diſpoſes of ſome part of his perſonal eſtate as heir-looms, and gives certain legacies directed to be paid out of the perſonal eſtate. It is ſaid, that ſhews the debts are to be paid out of the real eſtate. That intention appears with no degree of certainty. He might have meant only to diſtinguiſh thoſe legacies from the other legacies, to be paid out of the real eſtate. No clear intention appears to make a diſtinction between debts and legacies, and that the

(*e*) *Supra*. (*f*) Walker *v.* Jackſon, *infra*.

latter only ſhall come out of the perſonal eſtate. It is ſaid, the words 'except as aforeſaid,' refer to thoſe few legacies immediately before given. That is clear miſconſtruction; they refer to what is immediately before mentioned, viz. what is excepted for heir-looms. In *Tait* v. Lord *Northwick* (*g*), there was more room for arguing that the reſiduary clauſe had reference to the two legacies immediately before given; but it was held to mean the general reſidue; that it muſt be taken as ſuch, and muſt be ſubject to every thing naturally a charge upon the fund of which it is the reſidue, though the teſtator does not diſtinctly enumerate every thing payable out of it. The reſiduary legatee cannot take the fund except after diſcharging every thing payable out of it. Upon the whole of this will there is no indication plain of an intention to exonerate the perſonal eſtate from the omiſſion to provide for the funeral expences. I rather conjecture that the teſtator did intend that the real eſtate he had ſet apart ſhould be devoted to the payment of his debts. I could not be certain that I might not be miſtaken even in privately ſuppoſing that; but there is no ground upon which I can judicially collect a ſettled intention. The truſtees and executors are not in this caſe wholly the ſame perſons. Where they were the ſame, that has been uſed as an argument againſt the exoneration; in this will two of the executors are truſtees, but then the wife is added."

It appears as well from the caſes laſt ſtated as thoſe mentioned below, that teſtators have the power as againſt their repreſentatives of depriving the real eſtate of this equity or privilege, by ſhewing an intention that it ſhould be *primarily* liable to the payment of debts and legacies. This intention however muſt appear, either *by expreſs declaration in writing*, or *by a plain and neceſſary implication*; as for inſtance, when the perſonal fund is given in the form of *a ſpecific legacy*. In order to illuſtrate this—

(*h*) *A.* deviſed lands to truſtees to be ſold for payment of debts and legacies, and bequeathed the reſidue of his perſonal eſtate to his wife. He alſo gave her 600l. out of the money to be raiſed by ſale of the truſt-eſtate, and appointed her executrix. Upon a ſuit inſtituted by the teſtator's heir, to have the perſonal eſtate firſt applied in payment of the debts and legacies in exoneration of the real, Lord *Harcourt*, C. ſaid, that in this caſe there was not only a diſpoſition of the reſidue of *A.*'s perſonal eſtate to his executrix, but an additional gift of 600l. to her out of the real property, ſo that the teſtator did not think the reſidue of his perſonal eſtate ſufficient for her.

(*g*) *Supra.* (*h*) Waiſe *v.* Whitfield, 8 Vin. Abr. "Deviſe" 437. pl. 19.

That the further bequeſt of the 600l. afforded the *ſtrongeſt preſumption* imaginable of the teſtator's intention, that his wife ſhould have the whole of his reſiduary perſonal eſtate. His Lordſhip therefore diſmiſſed the bill.

(*i*) *B.* deviſed as follows; "I will that all my eſtate in the county of *Lincoln*, or a ſufficient part thereof, be ſold as ſoon as my executrixes conveniently can, for the payment of my lawful debts and the legacies hereafter mentioned, and the expence of my funeral, which I leave to their diſcretion: I give to *E. Marſhall* one annuity or yearly rent charge of 200l. to be raiſed out of all my eſtate not hereafter otherwiſe engaged in the county of *Norfolk*, to be paid her half yearly." He then gave ſeveral ſpecific legacies and a miniature picture, and ſeveral prints to *Emma Marſhall*, and proceeded thus.—Laſtly, I appoint the above mentioned *Emma Marſhall* and *Dorothy Beauprè* joint executrixes of this my will, written with my own hand this 10th of December, 1740." In 1741, the teſtator added theſe words to his will, "and I give and deviſe to them all my perſonal eſtate not herein before-deviſed," and then executed it over again in the preſence of three witneſſes, whoſe names appeared under it. The principal queſtion was, whether the perſonal eſtate ought in favour of the heir at law to be applied in exoneration of the real eſtate? And Lord *Hardwicke*, Chancellor "the perſonal eſtate is to be applied for the payment of debts in the firſt place, this is the general rule, and it is as certain that a teſtator cannot as againſt his creditors exempt his perſonal eſtate; but againſt his heir at law, or the deviſee of his real eſtate, he may ſubſtitute the real in the room of the perſonal eſtate, and charge the debts upon another fund, which is not in its nature primarily liable. There are ſeveral different ways of giving *real eſtate*, ſubject to debts. A teſtator may do it by a deviſe of the real eſtate for a term of years to pay the debts, or he may do it by way of *charge*, and let it deſcend upon the heir at law: or he may do it by *direction* only without deviſing it over: but let him do it by either of theſe three ways, of which doing it by way of charge is much the ſtrongeſt) yet neither of them ſhew the real eſtate is to be primarily applied. For if a man deviſe real eſtate by way of truſt, either to be ſold for a term of years, or the inheritance to be ſold, if he has done nothing to exempt the perſonal eſtate, it ſhall be primarily liable. The general rule of this court, though delivered ſometimes in one form, and ſometimes in another, is that the perſonal eſtate ſhall be applied unleſs there be expreſs words or a plain intention of the teſtator to exempt his perſonal eſtate, or to give the perſonal eſtate *as a ſpecific legacy*, for he may do this as well as give the bulk of his real

(*i*) Walker *v.* Jackſon, 2 Atk. 624.

eſtate by way of ſpecific legacy. Therefore in the preſent caſe, there muſt be a manifeſt plain intention in this will to exempt the perſonal eſtate. And I am of opinion there is ſuch a manifeſt plain intention to give the perſonal eſtate as a ſpecific legacy to his executrixes, and to exempt it from his debts. See the deviſe of his *Lincolnſhire eſtate.* After giving ſeveral ſpecific legacies, he ſays, *laſtly, I appoint the above-mentioned E. Marſhall and D. Beaupré joint executrixes of this my will.* If the teſtator had reſted there, it was only making them executrixes, and the perſonal eſtate would then have been applicable to exonerate his real. But the teſtator ſometime after adds theſe words: *and I give and deviſe to them all my perſonal eſtate not herein before deviſed*, and in a formal manner re-executes his will, and this I muſt take notice of as it muſt be made part of the probate. This is an extreme ſtrong circumſtance to ſhew the intention of the teſtator, and indeed inſurmountable, and a much ſtronger caſe than if inſerted in the will when firſt executed, but if inſerted at firſt, I ſhould even have thought it a ſtrong caſe of exemption. The additional words upon the republiſhing of the will, do not mean what the teſtator had before ſpecifically deviſed out of the perſonal eſtate. Making a proviſion out of his real eſtate for *one* executrix will not bar her, neither will the *ſpecific legacies* given to one executrix bar either of the reſidue in the perſonal eſtate, for they are put in to give one a preference to the other, and to diſtinguiſh their two caſes, for he intended Mrs. *Marſhall* ſhould have particular parts. As the will ſtood originally the executrixes would have had very little benefit from it, and therefore upon the re-execution the teſtator threw in this clauſe to give them the perſonal eſtate by way of ſpecific legacy; when this circumſtance is conſidered, the caſes already adjudged are not ſo ſtrong as the preſent. *Adams* v. *Meyrick*, Eq. Ca. Abr. 271. at the *Rolls*, was a much *weaker* caſe; thoſe caſes where reſt and reſidue are given by will, are the weakeſt of all, and ſeveral caſes upon theſe words, where it has been held that the perſonal eſtate is not exempted from payment of debts in the firſt place. It is no objection here that the perſons to whom it is deviſed are made executrixes, for a teſtator may give an executor the perſonal eſtate as a ſpecific legacy exempt from debts, as well as to other perſons. The words debts, legacies, and funeral expences, are only words of ſtile, and no weight to be laid upon them. *Bradyſh* v. *Liſle*, the 30th of November, 1732, was not ſo ſtrong as this, nor *Hall* v. *Broker*, Gilbert 73. nor *Stapleton* v. *Colvile*, (*j*) Trin. T. 1736, there was only a power given which ſpeaks moſt ſtrongly that it was intended merely in aid of the perſonal eſtate. The caſes of *Bamfield* v. *Windham*,

(*j*) Forreſt. 202.

Pre. Chan. 101, and *Wainwright* v. *Bendlowes*, 2 Vern. 718. do not come up to this, but are much weaker than the preſent. Upon the whole, a ſtronger circumſtance cannot be than the republiſhing his will, and an alteration from what it was before; and unleſs it is conſtrued to be his intention to exempt his perſonal eſtate in favour of the executrixes, the words are fruitleſs and vain, and do no more in their favour than the will, as it originally ſtood would have done before; therefore theſe words can have no other ſignification than to exempt his perſonal eſtate." His lordſhip therefore decreed that the whole or a ſufficient part of the real eſtate ſhould be ſold to pay the teſtator's debts.

(*k*) *C.* deviſed all her freehold copyhold and leaſehold lands, &c. to two truſtees upon truſt after her death, with all convenient ſpeed to ſell, and with the money ariſing from the ſale to diſcharge the incumbrances affecting the ſame, and all other debts, and her *funeral expences*, and to inveſt the ſurplus in ſtock, and apply the rents of ſo much of her real eſtate as ſhould not be ſold, and the clear annual income of the money ariſing from the ſale after payment of the debts, for the benefit of her friend *J. Welch* for life, and after his death to convey, apply, and diſpoſe of all ſuch parts of her real eſtate, and the produce thereof not ſold or applied, to the heirs or heir at law of her couſin *W. Cockell*. The teſtatrix then gave ſeveral articles of perſonal property to her heir at law. She alſo gave legacies to ſeveral perſons, and 50l. to each of her truſtees above a reaſonable recompence for their trouble, which ſhe directed them to retain out of the truſt-premiſes. Then after giving ſeveral other legacies ſhe gave 200l. to be paid by her truſtees after the death of *J. Welch* to whom and in ſuch manner as he ſhould appoint. The teſtatrix bequeathed the reſt and reſidue of her perſonal eſtate and effects not before ſpecifically diſpoſed of to *J. Welch*, upon truſt to pay the ſame in manner as ſhe ſhould appoint, and in default thereof, ſhe gave the reſidue to him for his own uſe and benefit, and appointed him executor.—The teſtatrix having made no appointment, the queſtion was, whether the perſonal eſtate not ſpecifically diſpoſed of, or the real eſtate ſhould be firſt applied in diſcharging the debts? And by the *Maſter of the Rolls* "this is one of thoſe caſes that come ſo often before the court, and which have given riſe to ſuch difference of opinion upon the bench, that it cannot be wondered that I have taken ſo much time both in this and in *Brummel* v. *Prothero* (*l*), the next cauſe that ſtands for judg-

(*k*) Burton v. Knowlton, 3 Veſ. Jun. CC. 107. See Lord *Loughborough*'s obſervation upon this caſe in *Tait* v. *Lord Northwick*; and the reply of the Maſter of the Rolls in *Hartley* v. *Hurle*—both caſes ſtated *ſuprà*. (*l*) *Suprà*.

ment, and upon which I confeſs if the conſideration of the one, did not involve that of the other, I ſhould not have taken ſo much time: but this cauſe has given me more pain than any other that ever came before me: however upon full conſideration of the will, and fully ſubſcribing to the principles that ſwayed the court in the Duke of *Ancaſter* v. *Mayer* (*m*), I am perfectly ſatisfied this teſtatrix did intend to give her perſonal eſtate to *J. Welch* exempted from the payment of debts. The caſes are very numerous and great judges have differed upon them. Some have thought the words ſufficient to exempt the perſonal eſtate: others have thought they did not afford that demonſtration. There are certainly many ingredients in this, that ſeem to have been relied upon by judges, who have thought the perſonal eſtate not exempt. The circumſtance that the truſtees are not the executors, affords a ſtrong inference as to the real intention, and is always favourable to the exemption of the perſonal eſtate; and I deſire to have it underſtood that though the words 'funeral expences' compriſed in this truſt occur in ſome of the caſes, and are held not to have any conſiderable weight, yet that is where the truſt-fund is given to the executors, to whom the perſonal eſtate is afterwards given; and I cannot but think, that where the truſt-fund is given with ſuch general words to truſtees who are not the executors, upon whom the funeral expences would naturally fall, it does afford a conſiderable argument that the teſtatrix did not mean the perſonal eſtate to be the fund for all thoſe charges, which naturally fall upon it. The ſubſequent words of the reſiduary clauſe convince me that ſhe did not mean to give it to him as executor but *as a ſpecific legacy*, and exempt from the debts; for ſo far from being given to him as executor, and his being intitled to it as ſuch, it is given to him upon truſt to diſpoſe of according to her appointment, and in default of appointment for his own uſe, and then ſhe makes him executor. I need not ſtate the principles which have been ſo often commented on, and are ſo fully laid down in the Duke of *Ancaſter* v. *Mayer*, that unleſs there are words, not expreſs, but tantamount to expreſs, ſo as to afford demonſtration plain, that the perſonal eſtate is intended to be given as a *ſpecific legacy* and exempt from the payment of debts, it ſhall be taken ſubject to them. Great ſtreſs was laid in the argument upon the word *reſidue*, and it was ſaid Lord *Thurlow* in the Duke of *Ancaſter* v. *Mayer* laid great ſtreſs upon that word. I think in that caſe, a great deal of argument did ariſe from the word as there applied; but I cannot read this will without giving to the words *reſt* and *reſidue* a meaning totally diſtinct from reſidue after payment of

(*m*) *Supra.*

debts; for thoſe words coupled with the words "not ſpecifically bequeathed" mean only ſuch parts of the perſonal eſtate as are not ſpecifically given, which alludes to what ſhe had before given to the heir, or to the leaſehold eſtates given to the truſtees. There are ſo many ſhades of difference between the Duke of *Ancaſter* v. *Mayer*, and this caſe, that a thouſand arguments might ariſe in that which do not ariſe in this; and when I read *Walker* v. *Jackſon* (*n*) before Lord *Hardwicke*, who certainly differed from Lord *Talbot*; and when I read Lord *Thurlow's judgment* in the Duke of *Ancaſter* v. *Mayer*, I cannot think that the word *reſidue* bears upon this caſe as it did on that, for there the truſtees were likewiſe executors. The teſtator gave all his perſonal eſtate to the perſon intitled to the rents and profits of his real eſtate. It is not given as a reſidue as here; but all his perſonal eſtate ſo given, he himſelf afterwards calls by the name of reſidue; and then upon which Lord *Thurlow* very juſtly laid the greateſt ſtreſs, and which I think put it out of the power of the court to exempt the perſonal eſtate, he nominates the ſame perſons executors of his will, who were truſtees for the payment of debts; and directs them to diſcharge his funeral charges, and all his debts and legacies, as ſoon as they ſhould become due and payable, as counſel ſhould adviſe, and to ſatisfy themſelves out of his perſonal eſtate or the truſt fund, all diſburſements, expences, and charges they ſhould be put to, in proving or in the execution of the will. Lord *Thurlow* thought it too much to ſay upon ſuch a gift, the truſtees holding both funds, and having an option to pay out of both promiſcuouſly, that the perſonal eſtate was intended to be exempt. Great doubts were entertained upon that caſe at that time, but I moſt heartily ſubſcribe to it. But Lord *Thurlow* there ſays, what has impoſed a moſt grievous taſk upon the court, that it is too late to ſay, expreſs words are neceſſary. There are many caſes determined in favour of the perſonal eſtate, which I ſhould have had great difficulty to acquieſce in. *Adams* v. *Meyrick*, 1 Eq. Ca. Ab. 271. is a very weak caſe. In *Stapleton* v. *Colvile*, the circumſtance laid hold of by Lord *Talbot*, does not ſatisfy my mind; nor does it ſeem to have ſatisfied Lord *Hardwicke* and Lord *Thurlow*: viz. the mere circumſtance of the executor having a power to raiſe ſo much out of the term as would be ſufficient for the debts. I have felt great anxiety and difficulty for fear of drawing ſo nice a line, that judges can hardly tell how to guide themſelves in determinations of this ſort. I have looked very carefully at *Walker* v. *Jackſon* and it muſt be remembered that Lord *Hardwicke* who determined that caſe, thought the words not ſuf-

(*n*) *Supra*.

ficient in Lord *Inchiquin* v. *O'Brien* (*o*). In the former he considered all the cases. In applying that case to this, I am perfectly satisfied, that if he was right in the consequence he drew in that case, I am warranted in that which I have drawn in this. It was upon the codicil, that Lord *Hardwicke's* opinion turned, as affording a presumption for the exemption of the personal estate: but if the report is right, he did not rest merely upon its being by way of codicil, but thought that if it had been in the will, it would be a strong case for the exemption of the personal estate. So I think, for the codicil is only part of the will, and it is to be taken altogether. This testatrix having given this fund in the largest words to pay all mortgages and incumbrances, and all other debts, and even her funeral expences, to persons who are not those naturally to pay them, gives the rest and residue not before specifically bequeathed, to the person whom she makes executor, but not as executor, for she had an intention of appointing it; and then in default of appointment she gives it to him for his own use. Compare these words with *Walker* v. *Jackson*. I think that I am perfectly warranted in saying, there is demonstration plain, that she did not mean to give it to him as executor, but *specifically* for his own use, exempt from the payment of debts. I have had great difficulty, and am much afraid of breaking in upon established rules, which I never desire to do. There is a case which is not reported, and was suggested by me, and deserves some account to shew that the principles of it are not broken in upon. It is *Gaskill* v. *Hough*, *Feb.* 1774, in which I was counsel. The court thought the personal estate exempted. That depends upon a very different principle. It was neither a *charge* for debts, nor a *devise* for payment of debts, for I am not one of those judges who think there is much difference whether it is the one or the other, unless there is demonstration that the personal estate is intended to be exempted. That case was not a charge upon the real estate, but an express direction and declaration that the debts, funeral expences, and charges of probate should be paid *out of the real estate*; and the testator then gave his personal estate to his wife, except a leasehold estate in *S.* which he gave to another. The heir was an infant. The court has never gone the length of saying, that in such a case the real estate is not particularly appropriated, and from that very appropriation the personal estate is exempt (*p*). Fully acquiescing in the Duke of *Ancaster* v. *Mayer*, "I am perfectly satisfied that I am warranted in holding, that this personal estate is given to *J. Welch* exempt from the payment of debts."

When the real estate is directed *to be sold out and out*, and the

(*o*) *Supra*. (*p*) See Heath v. Heath, 2 P. Will. 366. S. P.

reſidue of the money after payment of debts and legacies *to be added to the perſonal eſtate*, the real will not be entitled to be exonerated by the perſonal eſtate. Thus,—

(*q*) *A.* deviſed his real eſtate to be ſold, and the money to ariſe by the ſale, to be applied to pay mortgages and other debts, the reſidue to be added to his perſonal eſtate. Queſtion, whether the real eſtate ſhould exonerate the perſonal? And the *Maſter of the Rolls*, after noticing the general rule, and that there was no peculiar form of expreſſion neceſſary to exempt the perſonal eſtate, ſaid, "Here, the intention is beyond all doubt, I lay no great ſtreſs, but I muſt lay ſome upon the words, *when ſold the money to be applied to the payment of mortgages and all other debts.* If one was to aſk the teſtator what he meant, he would ſay, to pay all the debts. This is a ſtronger caſe than that of the Duke of *Ancaſter* v. *Mayer* (*r*). The teſtator has directed the reſidue to be *added* to the perſonal eſtate; but according to the conſtruction contended for, that would be gone. I muſt declare that the money ariſing from the ſale is to be applied in payment of debts, in exoneration of the perſonal eſtate."

It ſeems that the caſes have gone farther in exempting the perſonal eſtate, than in mere inſtances where it was given away in the nature of a ſpecific legacy, or directed to conſtitute one fund with the real, and extended the exemption to caſes, where the perſonal eſtate was bequeathed as *general reſidues* in the uſual way (*s*). But it appears that the reaſons upon which the decrees in thoſe caſes were founded, are neither clear nor intelligible. When the perſonal eſtate is bequeathed *ſpecifically*, an intention to exempt it in favour of the particular legatee, may be reaſonably inferred: but the intention of exempting ſuch eſtate collected from the ſimple fact of diſpoſing of it *generally* as a reſidue, when the real eſtate is made liable to the payment of debts, appears to be an unſound and a weak mode of conſtruction. Of this opinion was Lord *Hardwicke*, as we have ſeen, in *Walker* v. *Jackſon*, and Lord *Thurlow* in the Duke of *Ancaſter* v. *Mayer*. It ſeems upon the whole, that the principle of the caſes referred to, determined in favour of the reſiduary legatees, is to be conſidered as unfounded and erroneous, and which will not be adhered to in future adjudications. Lord Keeper *Henley* appears to have been the firſt who broke in upon it in *Stephenſon* v. *Heathcote*, cited by Lord *Thurlow* in the Duke of *Ancaſter* v. *Mayer* (*t*).

(*q*) Webb *v.* Jones, 2 Bro. CC. 60. (*r*) *Suprà.* (*s*) Adams *v.* Meyrick, 1 Eq. Ca. Ab. 271. Bamfield *v.* Wyndham, and Wainwright *v.* Bendloes, Pre. Ch. 101—451. Bicknell *v.* Page, 2 Atk. 79. Anderſon *v.* Cook, and Kinnaſton *v.* Kinnaſton, cited in Ancaſter *v.* Mayer, 1 Bro. CC. 456. (*t*) *Suprà.*

If the real eſtate be charged with debts in the firſt inſtance, in favour of the legatee of the perſonal eſtate, yet if the legatee die before the teſtator, the privilege of exemption will not be extended to the executors or next of kin, but the perſonal fund muſt be primarily applied in payment of the debts, &c. as in general caſes. Accordingly—

(*u*) *A.* by will, (after giving two annuities, and reciting that ſince his marriage, he had purchaſed to him and his heirs the manor of *Ince*, but to enable him to do ſo, he had mortgaged the ſame and other lands and premiſes) deviſed all his eſtate and intereſt therein, ſubject to the annuities, and ſuch other annuities, bequeſts, and directions, as by his will, or by any codicil he might give, expreſsly charging his eſtate of *Ince* therewith, to his wife for life, and after her death to ſuch uſes as ſhe ſhould appoint ſubject as aforeſaid, ſo as ſuch appointment ſhould not take effect till ſuch parts of his lands in *S.* as were in mortgage to *M. O.* ſhould be diſcharged therefrom; and in default of ſuch appointment then to his own right heirs, ſubject as aforeſaid. And farther reciting that before his marriage, with his then wife, ſhe had conveyed all or a conſiderable part of her lands, &c. in the county of *Flint*, to truſtees upon truſt, that they ſhould ſo ſoon as the teſtator ſhould require, by mortgage thereof raiſe 3000l. and pay off the principal and intereſt of a mortgage of 1850l. upon his eſtate at *O.* and then pay the reſidue of the 3000l. to the teſtator: he the teſtator directed, unleſs as therein after provided, that the truſtees ſhould as ſoon as convenient, raiſe the 3000l. and diſcharge the mortgage, and pay to his wife the reſidue of the 3000l. which he gave to her, together with all the reſt of his perſonal eſtate, upon truſt to diſcharge *all his debts, for which at the time of his death he ſhould not have given real ſecurities*, and all ſuch bequeſts and annuities (not including thoſe before mentioned) as he ſhould therein or by codicil give, and with which he ſhould not expreſsly charge his eſtate in *Ince*; and to keep the reſidue of the 3000l. and of all other his perſonal eſtate to her own uſe: provided that if ſhe ſhould by any other means diſcharge the ſaid mortgage and his ſaid debts, and ſhould pay all ſuch bequeſts and annuities, (not including thoſe before granted) the 3000l. ſhould not be raiſed. *Margaret* the teſtator's firſt wife died in his life, and he married *again*, but died without republiſhing his will. The queſtion was, between the heir and the teſtator's widow and ſecond huſband, the heir inſiſting that the perſonal eſtate ought to be applied in paying off the mortgage-debt, affecting the purchaſed eſtate, &c.? And by the *Maſter of the Rolls*, "the only queſtion before me now is, upon the will;

(*u*) Waring *v.* Ward, 5 Veſ. Jun. CC. 670.

whether the perſonal eſtate is diſcharged from the teſtator's debts ſecured by mortgage. With reſpect to that queſtion, I have no difficulty in declaring, that it is impoſſible upon this will to raiſe any preſumption, that the teſtator meant to exempt the perſonal eſtate in favour of *this* defendant from thoſe debts, which if there be no exemption will be a charge upon it. I could refer to many caſes, and one before Lord *Thurlow*, that is quite analogous in which this has been determined: but upon principle, without referring to the authorities, nothing is more clear, than that if there be any gift in favour of a particular legatee, and he dies, no benefit that legatee could have claimed, if he had ſurvived, can be ſet up againſt the perſons to whom the eſtate would come, ſubject to the diſpoſition in favour of that legatee if he had lived. If for inſtance, an eſtate had been given to *A.* and the perſonal eſtate to *B.* exempt from debts, that exemption is to be conſidered as only intended for the benefit of *B.* that he ſhall not pay thoſe debts to which he would be liable, if no ſuch proviſion had been made; and is not a general exemption of the perſonal eſtate. The caſe of *Pickering* v. Lord *Stamford*, (2 Veſ. Jun. CC. 272. 581. 3 vol. 332. 492.) is very analogous in principle. My firſt decree was againſt the right of the widow, conſidering her barred in all events: but I changed my opinion upon a rehearing; and the decree as then varied, was affirmed upon appeal by the Lord Chancellor. Nothing is more clear, than that where an exemption is created for the benefit of a particular perſon, not for the benefit of the eſtate generally, if that perſon cannot take it, the benefit never ariſes. The teſtator has never expreſsly charged the perſonal eſtate with theſe debts. He gives the eſtate he had purchaſed, charged with annuities, and ſuch other annuities, bequeſts, and directions, as he might afterwards give, to his wife for life, with a power of appointment. He afterwards gives her the perſonal eſtate not in words of exemption, but with words of charge, that are upon fair inference, equivalent to words of exemption from debts, for which he ſhould, at the time of his deceaſe, have given real ſecurities. I admit, therefore, that *Margaret* the firſt wife, would have taken the perſonal eſtate diſcharged from thoſe debts. The clear effect in point of law, is a gift to her of the perſonal eſtate with the benefit of this exemption, and there is no inference upon which any one elſe can claim the benefit of it. Upon the true conſtruction of this will, therefore, this diſcharge of the perſonal eſtate could operate only in favour of the firſt wife, and unfortunately, the teſtator not having republiſhed his will, or made any other diſpoſition, it is the ſame as if he had never made any diſpoſition as to the effect of the ſecurities to which his real eſtate was liable; and it muſt

be admitted under the circumſtances, that there is a charge with reſpect to which the heir at law has a right to an account (*x*).

One eſſential requiſite to create a charge upon real eſtate, is, that the execution of the will be atteſted by three witneſſes, purſuant to the direction of the ſtatute of frauds and perjuries (*y*). If however, a teſtator create a *general* charge of legacies upon his lands, by a will properly executed and atteſted, and afterwards by a codicil not duly executed and atteſted to affect real Eſtate, bequeath additional legacies; upon a deficiency of perſonal aſſets, the legacies by the codicil will be conſidered charges upon the real eſtate, equally with thoſe given by the will (*z*). The principle ſeems to be founded in analogy to caſes upon debts, which if charged *generally* on lands, will include, as well thoſe debts contracted after, as thoſe incurred prior to the date and execution of the will.

(*a*) *A.* deviſed to her ſiſters all the reſt and reſidue of her real and perſonal eſtate, *after payment of her debts and legacies*, and made them executrixes. The teſtatrix added a codicil, and gave to the plaintiff a legacy in theſe words. "This I deſire may be performed by my loving ſiſters, to give 200l. to my couſin *E. Hannis*." The codicil was not executed in the preſence of any witneſſes. Queſtion, whether the 200l. was a charge upon the real eſtate? And Lord *Hardwicke*, C. "when a real eſtate is duly deviſed to truſtees, and is well charged by a will duly executed, with debts and legacies; debts which are contracted after the will, or legacies given by a codicil, though not duly executed, will be a charge upon the real eſtate, for the real eſtate was well charged by the will, with the debts and legacies, and it is immaterial by what inſtrument they appear, provided ſuch inſtrument has been proved as part of the will; and when that is done, it is ſufficient to denote the truſt, and that it is part of what was intended to be compriſed."

If the charge of legacies by will upon lands, be *not general*, but confined to particular bequeſts, although *additional* legacies to charge the real eſtate cannot be given by a codicil not duly atteſted to affect real intereſts (*b*), yet the legacies given by the will may be ſubſtituted, altered or revoked by ſuch a codicil; Thus,—

(*c*) *A.* by his firſt will deviſed as follows, "In the name, &c. I, *Richard Boughton*, of &c. do give and diſpoſe my worldly eſtate as follows:—Imprimis, I give and deviſe to my ſiſter, *E. Brudenell*, 800l. to be laid out for the advantage of herſelf during life, and afterwards to her children; and like-

(*x*) See Chap. "of marſhalling aſſets," for further information on this ſubject. (*y*) 29 Car. 2. cap. 3. (*z*) 1 P. Will. 423. Ambl 33—41. 3 Veſ. Jun. CC. 163—164. (*a*) Hannis *v.* Packer, Ambl. 556. (*b*) 1 P. Will. 423. (*c*) Brudenell *v.* Boughton, 2 Atk. 268.

wife I beg that she will take the advice of my executor. *Item.* I give to my sister *M. Layng*, 400l. to be laid out in the same manner, and to the same purpose as Mrs. *Brudenell's*". The testator then gave some small pecuniary legacies and continued his will in these words.—" Lastly, I give the remainder of my estate at *N.* and *D.* in the bishoprick of *Durham*, and all my freehold and personal estate whatsoever, not herein otherwise disposed of, after payment of my just debts and legacies to my brother *S. Boughton*, whom I also appoint my executor to this my will, thereby revoking all others." The testator made a second will at *Lyons*, as follows. " In the name of God, &c. I, *R. Boughton*, of, &c. make and appoint this my last will and testament, *hereby revoking all other wills. Imprimis*, I give and bequeath to my dear sister *Layng*, 100l. *Secondly*, I give and bequeath to my dear sister *Brudenell*, 400l. *Lastly*, I give and bequeath to my dear brother *S. Boughton*, all the rest of my estate real and personal, and appoint him my executor." This will was written by the testator but was unattested. " To *S. Boughton*, Esq. I beg to recommend my sister *Brudenell* to your kindness, and besides the legacy left her, I beg you would give to my godchild, 200l. and in case that child should be dead, I desire that you may give that sum to her eldest son; *I desire this only in case you make use of the last will.*" *R. Boughton.* The bill was brought by Mrs. *Brudenell* and her husband, to have the legacies left to her, raised and paid by the defendant out of the testator's real estate. The first will was executed by the testator in the presence of three witnesses, and in every respect according to the statute of frauds and perjuries. The second was made at *Lyons*, in his last illness, but was not executed according to the statute. The principal questions were, Whether the legacies given under the first will, were a charge upon the real estate, and whether they were revoked by the second? And Lord *Hardwicke*, C. " This is a case of some nicety, and admits of some distinction from all the cases that have been cited on either side. The first question is, whether the legacies given by the first will, are revoked by the second? The second question is, whether the lesser legacies under the second will, are a charge upon the testator's real estate? The testator had a small personal estate and a real estate; by the first will, which was duly executed, he gives to his sister *Brudenell*, 800l. &c. and to his sister *Layng*, 400l. and the residue of his real and personal, not before disposed of, after payment of debts and legacies to the defendant. By the second will, he expressly revokes all former wills, and gives to his sister *Layng*, only 100l. and to his sister *Brudenell*, only 400l. the residue of the estate as before to the defendant; this was not executed according to the statute, but being suf-

ficient as to the perſonal eſtate, was admitted to be proved in the eccleſiaſtical court; there is likewiſe a codicil accompanying it, or, as it is called in the Commons, a teſtamentary ſchedule. The bill is brought by Mrs. *Bradenell* and her huſband, to have the legacies given to her under the firſt will, raiſed out of the teſtator's real eſtate. This muſt depend upon the conſtruction of the ſtatute of frauds and perjuries, and the conſequences of law ariſing upon it. It is very certain no deviſe of lands can be made, but with ſuch ſolemnity accompanying the execution of it, as is directed by this act; and it is equally clear, where a ſum of money is given *originally* and *primarily* out of land, a will with that charge muſt be equally executed with the ſame ſolemnity; becauſe it is conſidered in this court as part of the land, ſince it can only be raiſed by ſale or diſpoſition of part of the land, and this is analogous to the rule of law, that a deviſe of rents and profits is a deviſe of the land itſelf. The rule is likewiſe the ſame as to the revocations of a deviſe of lands; and with reſpect to a revocation of a ſum of money charged by a will upon lands, they muſt both be revoked in the ſame manner. But then it muſt be conſidered that there are different ſorts of revocations or ademptions, call it which you will; there are *expreſs* revocations of the teſtament or inſtrument itſelf, which muſt purſue the directions of the ſtatute in the ſixth ſection, by cancelling or obliterating, &c. but beſides theſe expreſs revocations, there are *virtual* ones, even ſince the making of the ſtatute, as by extinguiſhing or deſtroying the thing deviſed; and where that is done by the teſtator in his life-time it muſt prevail, and this is founded upon maxims of law. *Ceſſante cauſâ ceſſat effectus, ſublato fundo tollitur id quod fundi poteſt*, therefore theſe are out of the ſtatute and remain as they did before. Suppoſe a man makes a will according to form, and afterwards ſells or conveys away the lands he had deviſed to other perſons, notwithſtanding the form of revocation preſcribed by the ſtatute is not purſued, yet it is a virtual revocation, for it is not abſolutely neceſſary a deed ſhould have witneſſes, it is good without it. Suppoſe, after making a will, a man makes a feoffment to the uſe of himſelf and his heirs, it is a revocation. Suppoſe a man charges his lands with a debt and afterwards pays that debt, it is extinct, and yet here is no formal revocation; or ſuppoſe he charges his lands with a portion for his daughter of 1000l. and gives her the ſame in his life-time, this is a revocation of the charge, though there is no actual one. So in the preſent caſe, this gentleman makes his will, and gives general legacies which muſt be taken originally for perſonal; the latter words indeed create a charge upon the land, but in

their primary intention, perſonal; and without controverſy, if there had been perſonal aſſets, they would have been firſt applied, and the land only a collateral ſecurity, but if the thing ſecured be taken away, how can the ſecurity itſelf ſubſiſt. It has been ſaid that the real eſtate under the firſt will is to be conſidered as originally charged; but I am of opinion, that the real eſtate is not originally charged, but given only by way of ſecurity: the caſe of *Hyde* and *Hyde*, is a caſe in point, and in all thoſe caſes where a man gives a perſonal legacy charged upon real eſtate, and the will is revoked, the legacies are gone. There is more difficulty in the ſecond general queſtion, whether the leſſer legacies under the latter will are a charge upon the land? and I am of opinion that they are. Conſider it in two lights—*Firſt*, as if new legacies were given originally and *de novo*. And, *ſecondly*, whether they are not part of the ſame legacies deduced and newly modified? it would be a very unfortunate circumſtance if the fund ſhould be gone and taken away. The words of the ſecond will: 'I give the reſt of my eſtate, real and perſonal, to my dear brother *Shuckborough*, and appoint him my executor.' *Vide* the ſecond will. So that the land as well as the perſonal eſtate, is given to the ſame perſon that he makes executor: all the legacies conſidered as *de novo* are charged upon the land. A man may by way of power, by any writing ſigned by him, be enabled to charge the land. I ſee no greater inconvenience in this, than where a man charges his lands by will with the payment of his debts, for then all the debts he contracts during his whole life will be a charge. Suppoſe a man makes two wills, as is often done, the firſt charging the real eſtate with his legacies: by the ſecond will, there are general pecuniary legacies, but it is not executed in form, yet I have no doubt but the latter legacies in the ſecond will would be equally a charge upon the land *(d)*. But, in the preſent caſe, there is no occaſion to go ſo far, becauſe the legacies given by the ſecond will, may be conſidered as part of the money given by the firſt, only *new modelled* or *qualified*. Theſe are leſſer ſums, 100l. inſtead of 400l. and 400l. inſtead of 800l.; if given exactly in the ſame manner and to the ſame perſons, there could have been no doubt but their being leſſer ſums, would have been a revocation *pro tanto*, and undoubtedly a charge upon the land; but the being given differently, and to different perſons, makes the nicety. However, I am of opinion, this is no more than a leſſening of the *quantum* of the money given by the former will, and only differently modified. By the teſtator's doubt indeed, *viz. I*

(*d*) See the laſt caſe.

desire this only in case you should make use of the last will: it looks as if he had an intention to leave it in the discretion of the defendant, whether he would make use of the last will or not, though it is a little odd that this should be his intention, because the one was for and the other against the interest of his brother; therefore upon the whole, I must decree the raising the lesser sums out of the real estate of the testator."

(*a*) By deed and fine, the estates of *Sarah Kipling*, at *Guilsborough* and *Cold Ashby*, were settled to such uses, and subject to such powers, &c. as she and *John*, her husband, should *jointly* appoint, and in case of no joint appointment, then to such uses and subject to such powers, charges, &c. as the survivor by deed or by will, signed, sealed, and published, in the presence of three or more credible witnesses, should direct, limit, and appoint, and in default thereof, to the husband's right heirs for ever. The husband died without any joint appointment having been made, and *Sarah* by her will properly executed to pass and charge real estates, devised her estate at *Cold Ashby*, to *C. Kipling* in fee, to whom she also gave her plate, linen, and china. After giving to the daughter of *C. Kipling*, her watch, rings, and wearing-apparel, she devised all her real and personal estate, not otherwise disposed of, unto *G. Conibeere* in trust to sell, and after paying the charges of the sale out of the produce, then to discharge all her debts, funeral and testamentary charges, and in the next place to retain for his own use 20*l*.; and she directed her trustee to pay to *J. Peach*, all money due to him upon mortgage of her estate at *Guilsborough*, and the additional sum of 20*l*. as a mark of gratitude for his trouble in having received her rents; and also to the trustees of a methodist chapel, 100*l*. The testatrix gave legacies of 50*l*. to the infirmaries of *G.* and *N.* and of 20*l*. to the poor of the parishes of *Staverton* and *Guilsborough*, and then after some small legacies to individuals, and some directions concerning a monument for her husband, she directed her executor, in case a sufficiency remained, to pay 300*l*. to such of the children of *Edgcomb Daniel*, as should be living, in equal portions, and to pay 500*l*. to the sons of the clergy in *London*; but in case of a deficiency, she directed what should remain only should be paid to the sons of the clergy, and if there should be any overplus after payment of her debts, funeral and testamentary expences, and legacies, she directed her executor to pay such overplus to the poor of the parish of *Staverton*, &c. and appointed *G. Conibeere*, executor. By a codicil not properly attested to affect real estate, the

(*a*) The Attorney General *v.* Ward, 3 Ves. Jun. CC. 327.

teſtatrix gave to her brother's ſon *C. Kipling*, the 300l. deſigned for *Edgcomb Daniel*'s children, as ſhe knew not whether any of them were alive, and if they were well provided for. One of the queſtions was, whether the legacy of 300l. being a charge upon the real eſtate by the will, was effectually given to the ſon of *C. Kipling*, by the codicil? And on this point the *Maſter of the Rolls* expreſſed himſelf as follows:—"The queſtion is as to the ſubſtitution of *Kipling*, in the room of the children of *Edgcomb Daniel*. If this was a legacy charged only upon the land, nothing can be clearer than that it could not be altered either as to the *quantum* or the perſon, by any will, but ſuch as would have affected land: but being upon a mixed fund and once well charged, the teſtatrix may afterwards *modify* or *alter* it, as ſhe thinks fit. If a teſtator ſays, he charges all the legacies given by his will upon his real eſtate, and gives 20l. to *A.*, he may by an unatteſted codicil give that legacy of 20l. to *B.* It has been determined, that you cannot create new legacies but you may modify or alter any before given. You cannot give freſh legacies upon land, unleſs future legacies are charged; but you may ſubſtitute one for another. After the opinion I have given, that this ſubſtitution may take place, the next queſtion is whether this codicil is at all events a ſubſtitution; and upon reading it with ſome attention it is impoſsible to ſay, it is not a complete revocation of that legacy. It is an abſolute gift of the legacy deſigned for *Edgcomb Daniel*'s children; and the reaſon accompanies it. It was argued, and with ſome ground, that if it had reſted upon her not knowing whether they were living, there would be good reaſon to contend that it fell within the caſe of *pater credens filium ſuum eſſe mortuum*: but ſhe goes farther, that ſhe doubted if they were living, whether they might not be well provided for, and ſhe totally deprives them of that proviſion. The Court will not inquire whether they are well provided for or not. Declare therefore that the legacy of 300l. given by the will to the children of *Edgcomb Daniel*, is revoked by the codicil, and is well given by the codicil to *C. Kipling*, the younger. That the gift of the reſidue of the money ariſing from the ſale of the teſtatrix's eſtate after payment of the debts, funeral expences, and legacies being given to charitable purpoſes, is void by the *ſtatute*, and that the ſame belongs to *C. Kipling*, the elder, as heir at law to the teſtatrix's huſband, according to the deed."

It ſometimes happens that a teſtator by his will gives his real eſtate to truſtees to ſell, and apply the produce to purpoſes not expreſſed in the will, nor intended to be ſo but with a reference to ſome ſubſequent paper or letter for their direction in this reſpect, which is not executed and atteſted in ſuch

manner as is required by the ſtatute of frauds and perjuries. The general rule of law upon this ſubject is as ſtated by Lord *Eldon* in the next caſe, viz. "that an inſtrument properly atteſted in order to incorporate another not atteſted, muſt deſcribe it ſo, as to be a manifeſtation of what the paper is which is meant to be incorporated, in ſuch a way, that a court of equity can be under no miſtake (*f*)." In order to illuſtrate this—

(*g*) *A. L.* a Roman catholic prieſt of *Gravelines*, in *Flanders*, being ſeiſed in fee of ſome real eſtates in *England*, by will, dated the 5th of *December*, 1789, and atteſted according to the ſtatute of frauds, deviſed to *J. P.* and ſon, and their heirs, his real eſtates in truſt, to ſell; and until ſale, to apply the rents and profits unto ſuch perſon or perſons, and for ſuch ends, intents, and purpoſes, as he, the teſtator, ſhould by a private letter or paper of inſtructions, which he mentioned in his will, that he intended to leave with Mrs. *J.* then reſiding at *Gravelines*, or with her ſucceſſor for the time being, direct or appoint: And he directed his truſtees immediately after the ſale, to pay the money ariſing therefrom, and the intereſt until payment of the principal, unto and for the benefit of ſuch perſon and in ſuch manner as he ſhould by the like private letter or paper of inſtructions, direct and appoint. After giving each of his truſtees twenty guineas for their trouble, he bequeathed the reſidue of his eſtate both real and perſonal, unto the ſame truſtees, for the uſe and benefit of ſuch perſon as ſhould be named in the ſame letter or paper of inſtructions, and appointed his truſtees executors. The teſtator died at *Gravelines*, in *December*, 1794, and immediately after his death, two paper-writings were found in the ſame envelope with the will in his bureau, in the room in which he had reſided, belonging and adjoining to the monaſtery of *Engliſh* nuns at *Gravelines*, of which Mrs. *J.* referred to in the will was ſuperior. The envelope was ſealed up and indorſed in the hand-writing of the teſtator, "The will of *Anthony Lowe*." The papers were in the hand-writing of the teſtator, and to the following effect: "*J. P.* Eſq. and his ſon *John*, truſtees and executors of my will—Gentlemen, I deſire that immediately after my deceaſe, you will (previouſly deducting your charges and expences in the execution of your truſt) pay the rent of my houſes, in caſe they ſhall not then be ſold, or if ſold, pay the monies that ſhall ariſe by ſuch ſale and the intereſt thereof, and transfer and make over the ſecurities for the ſame, unto Mrs. *J.* now reſiding at *Gravelines* in *Flanders*, or to her ſucceſſor then in being, or to ſuch other perſon or perſons

(*f*) 2 Veſ. Jun. CC. 228. (*g*) Smart *v.* Prujean, 6 Veſ. Jun. CC. 560.

as they or either of them shall appoint. By this you will much oblige, gentlemen, your most affectionate friend and humble servant, *Anthony Lowe*. *Gravelines*, *April* the 17th, 1789." The other paper was directed thus—" Reverend Mother Abbess," and was in the following words: " Dear madam, as to the worldly estate or effects I may die possessed of or intitled to in *England*, I have devised them to *J. P.* Esq. and his son, upon trust, nevertheless that the said gentlemen shall, after my decease, as soon as conveniently may be, sell and dispose of my messuages or tenements, situate in *St. John's-street*, in *Carlow*-court, &c.; and in confidence moreover that they will, after deducting their charges and expences in the execution of their trust, pay the rent of my houses, if they shall not then be sold, or if sold, pay the money that shall accrue by such sale and the interest thereof, and transfer and make over the securities for the same unto your reverence, or your successors then in being, or to such other person or persons as you or your successor shall think proper to appoint. As on the one hand I stand indebted to Mr. *Errington* in 40l. and on the other hand bequeathed two legacies of twenty guineas to my executors, I am inclined to think the sum you will receive in consequence of the sale of my property, Mr. *E.* being paid, and the just mentioned legacies discharged, may amount to about 300l. or 400l. sterling. The first hundred pounds I desire sister *W. C.*'s acceptance of as a compensation for the loss she heretofore unfortunately sustained in her fortune. A second similar sum I beg may be placed out to interest, towards the entertainment of church linen; and third hundred to be applicable to the purpose or purposes which you or your successor may judge to be most expedient. Should the sum you receive exceed 300l. the overplus I entreat you to remit to Miss *C. M.* provided it does not surpass 50l. In case it does, what may remain in your hands after you have given her the 50l. you will be pleased to accept for your own particular uses. As nothing more occurs to mind that I could wish to add, except that I earnestly recommend myself to your's, and your community's pious prayers; and beg you will be so kind, as to get fifty masses discharged for the repose of my poor soul, and one low mass yearly to the same end, I shall therefore conclude with the unfeigned assurance, of how much and sincerely I am, dear madam, your, and your community's most truly well wisher, and devoted humble servant, *Anthony Lowe*, *Gravelines*, *April* 17th. 1789. N. B. The legacy projected in favour of Miss *C. M.* which I confidently trust will fall to her share, in consequence of the sale of my little property, proceeds partly from the real esteem and regard I have for her, and more particularly from the knowledge I have of her indigent circum-

ſtances." Mrs. *J.* the abbeſs, died in the teſtator's life-time. Immediately on his death, the cover containing all theſe papers was delivered to the lady, who ſucceeded Mrs. *J.* as abbeſs. *J. P.* the elder, died in the life of the teſtator, but his ſon took poſſeſſion of the real and perſonal eſtate, and the title deeds. A *caveat* was entered by the heirs at law and next of kin of the teſtator, againſt the probate of any of theſe papers, and they filed a bill in chancery againſt the ſurviving truſtee, and againſt *W. C.* and *C. M.* praying that ſuch truſtee might be declared a truſtee for the plaintiffs as to the real, and the reſidue of the perſonal eſtates, and deliver up the poſſeſſion and the title deeds, and account for the rents and profits and the perſonal eſtate, &c.; inſiſting that the papers found with the will could not be conſidered as the papers intended by the teſtator. And Lord *Eldon*, C. thus expreſſed himſelf, "I am very ſtrongly of opinion, thinking, theſe two legacies would be good, if the fund was well given, that there is not ſufficient legal certainty to be collected from the inſtrument ſigned by three witneſſes, that the teſtator has diſpoſed of his real eſtate. The rule goes no farther than this: (I except charges for debts and legacies) that if the produce of real eſtate is to be diſpoſed of, you muſt ſhew an inſtrument in effect executed by the teſtator in the preſence of three witneſſes, and evidencing from its own contents, that it is ſo in a ſenſe, even if no atteſtation is annexed to it. The rule of law is, that an inſtrument properly atteſted, in order to incorporate another inſtrument not atteſted, muſt deſcribe it ſo, as to be a manifeſtation of what the paper is, which is meant to be incorporated, in ſuch a way that the court can be under no miſtake. In that way of putting the caſe it is not neceſſary to decide whether the teſtator's intention before making the will, was, if theſe papers are incorporated, that his will ſhould not be conſummate till they were delivered to the Superior; though if the cauſe were decided upon that ground, I am not ſure it would be wrong; for I can imagine, that he might have conceived a purpoſe of piety, and taking it to be the moſt rational purpoſe of piety, he might conſider that notwithſtanding his purpoſe at that time, he might have more favour to his relations afterwards, and they might become as proper objects of his piety as any other; and therefore he might intend to diſpoſe of the money for ſuch purpoſe as ſhould be expreſſed in a paper he intended to leave with the Superior. I always thought the conſtruction of *Heylin* v. *Heylin* (*b*), rather critical. That caſe, however, was decided by high authority. But I take all theſe papers to have been prepared on the ſame

(*b*) Cowp. 130.

day. It is a more serious thing to execute a will than to sign a letter: therefore, I apprehend, he signed the letters then; but hesitated about executing the will till *December*. Judging as a private individual, there can be no doubt, that when he executed the will, he meant that instrument and these two letters should have their effect: but unless the rule of law allows me, I cannot establish the letters, and I am not satisfied, he meant them to have their effect unless *delivered* to the Superior, as he might mean that to be a part of the act to make the will complete. The intention of leaving them with her can never under the circumstances in which he lived, be satisfied by the circumstance of finding them in the convent. He was living, and had his bureau in that room belonging to the convent, and it is impossible upon that circumstance to say, that according to his intention he had left them with her. From his residence, he could not avoid leaving them there. This is fortified by what follows: Mrs. *Y.* lived sometime, and he never left any paper with her, or delivered any to her successor. Certainly at his death, the abbess had no notion they were left with her, for she desires the will to be brought to her, and gets possession of it. In favour of an heir at law, whom I must see disinherited by nothing but a clear manifestation of intention, it would not be too strong to say, the testator did not mean his will to be consummate, unless he should do that act of leaving it with the Superior, which he never did.—But there is another ground: not whether the said envelope or superscription is evidence that the testator meant these should be the papers referred to, but whether I must of necessity collect from the contents of the will, that they should be considered the same. The same cover is nothing with reference to the statute, and the superscription has not three witnesses. The true question is, if these papers were found in the bureau with the will, can I say from the contents of the will, these two papers are the papers referred to? Suppose several other papers were found with them: could I say this will would have enabled me to select these two as the only papers referred to? The rule and my opinion are, that the will has not by its contents sufficiently identified these papers to enable me to say they are necessarily incorporated: if not, they they are not attested by three witnesses, and it is admitted on all hands that this sort of disposition unless the antecedent paper is incorporated, cannot be brought within the rule as to debts and legacies charged on real estate by an unattested paper; I cannot, therefore, give these parties their legacies, though I regret it."

In considering the subject of this chapter, it must not be forgotten that the real estate when effectually charged with the payment of legacies will be liable to bear the burthen once only,

ſo that the legatees cannot reſort to it again, if the perſons intruſted with the power to raiſe and pay the legacies miſapply and waſte the money—accordingly in a caſe which was decided in the Houſe of Lords, Mich. 1689, and reported in *Salkeld(i)*. A man limited an eſtate to truſtees for payment of debts and legacies. The truſtees raiſed the whole money, and the *heir* prayed to have the land, which was oppoſed from the circumſtance of the truſtees not having applied the money purſuant to the truſt, but converted it to their own uſe, ſo that the debts and legacies remained unpaid; and it was reſolved, that the heir ſhould have the land diſcharged, and that the legatees ſhould take their remedy againſt the truſtees; for the eſtate was debtor for the debts and legacies only, and not for the faults of the truſtees; ſo that the eſtate continued liable ſo long as the debts and legacies *ſhould* or *might* be paid and no longer; and when the land had once borne its burthen, and the money raiſed, it was diſcharged and the truſtees liable.

(*i*) 1 Vol. 153, 1 P. Will. 518. S. P.

CHAP. VII.

Of Legacies upon Condition, Performance, &c.

Sect. I. Of Legacies upon Condition.

A LEGACY upon condition may be defined, "A bequeſt whoſe exiſtence depends upon the happening or not happening of ſome uncertain event, whereby it is either to take effect or be defeated." Theſe conditions admit of a two-fold diviſion, into conditions *precedent* and conditions *ſubſequent*. The former are ſuch as muſt happen or be performed before the legacy can veſt, the latter are ſuch as by non-performance will defeat the legacy already veſted. Thus if a legacy were given to *A. upon his marriage with B.* this would be a precedent condition, and muſt be performed before the legacy could veſt: but if a term were deviſed to *A.* upon condition that he paid to *B.* 100l. at Michaelmas, next after the teſtator's death, this would be a ſubſequent condition, ſo as to diveſt and defeat the bequeſt to *A.* if not performed.

Conditions which are impoſſible at the time of creation, or become ſo afterwards by the act of God, or of the teſtator, or which are contrary to law, or repugnant to the bequeſt, are void; but it muſt be noticed, that the effect of theſe conditions, in relation to legacies, is not always the ſame, for if the condition be precedent, that is, if it is to be performed before the legacy veſts in intereſt, although the condition be void, from the impracticability or unlawfulneſs of the performance, yet as the legacy is only given, upon the terms of complying with the condition, the legacy as depending upon it, muſt be alſo void (*a*). In this inſtance the common and civil laws differ; for by the latter, if the condition were impoſſible *ab initio*, it was void, whether precedent or ſubſequent, and the legatee was intitled to his legacy, unleſs it was apparent that the teſtator ſuppoſed the condition poſſible, at the time he created: Thus in the inſtance of a bequeſt to *B.* if he married the teſtator's daughter, ſhe happening to be then dead; as *non conſtat* the legacy would have been given if the teſtator had been appriſed of his daughter's death, the impoſſibility of performing the condition would not be allowed to enure to

(*a*) Show. Parl. Ca. 83---87. Co. Litt. 206.

the advantage of the legatee (*b*). In all cases, however, of conditions becoming void under the above circumstances, if such conditions be *subsequent*, the legacies will be considered absolute, that is totally discharged from them. Thus,—

(*c*) *A.* by his will devised as follows;—"I give all my manors, lands, &c. in *Cumberland*, to *James* (now Sir *James*) *Lowther*, (the plaintiff) in tail. And whereas I am owner of several burgage tenures in *Cockermouth*, it is my will they shall not be intailed, as I have done my other estates in *Cumberland*; and therefore I devise them to Sir *William Lowther* and his heirs. And whereas I think it right for *James Lowther* to have all the estates which Sir *William* has in *Cumberland*, and for Sir *William* to have all the estates which *James Lowther* has in *Yorkshire*, I give 30,000l. stock to Sir *William* and *A.* in trust for *James Lowther*, to receive all the dividends, till Sir *William* shall by absolute conveyance make over to *James* and his heirs all his estate in *Cumberland*, and *James* shall make over his estate in *Yorkshire* to Sir *William*: and in case of neglect or refusal by either, within eight months after *James Lowther* comes of age, such person shall not have any share of the 30,000l.; and in case it is made good and completed by them both, the 30,000l. to be equally divided between them." And he made Sir *William Lowther* sole executor and residuary legatee. Sir *William Lowther* died before any exchange was made, and before Sir *James* came at age. Question, whether *James Lowther* was become intitled to the legacy of 30,000l.? And by Sir *Robert Henley*, Lord *Keeper*, "This is a bequest of a chattel bearing fruit to Sir *James Lowther*, subject to be defeated by a subsequent event of his refusal to exchange. In such a case, the legatee has an absolute interest in the legacy till the event happens, just as the owner of a base fee has till the determination of it, as absolute an interest as the tenant in fee-simple, and if the event becomes impossible, the legacy becomes absolute, as if given upon an impossible condition; for then the condition is void as repugnant, and the legacy is good. This is, *legatum coercenti causâ non benevolentiâ*; a species at first reprobated by the *Roman* law as *nomine pœnæ*, but afterwards permitted. The end he intended by it was an exchange of their estates; upon that event it was to be shared between them: by Sir *William*'s death that event became impossible. Sir *James* was not in fault, he never refused, therefore the bequest became absolute in him." The decree was affirmed in the House of Lords.

(*b*) Swinb. Pt. 4. Sect. 6. passim. (*c*) Sir James Lowther *v.* Lord Charles Cavendish, Ambl. 356.

Inſtances may occur of the daughters of teſtators refuſing to marry the perſons to whom legacies are given upon the condition that ſuch marriages take place. In thoſe inſtances the civil law would not require a ſtrict performance, but conſtrue the offer and deſire of the legatees to effectuate ſuch marriages ſufficient to entitle them to the legacies (*d*). But it ſeems doubtful whether courts of equity would adopt the ſame rule of conſtruction in complaiſance to that law; *firſt*, becauſe according to the law of England, the conditions being precedent, no intereſt veſts prior to the performance of them; and *ſecondly*, becauſe no inference can be collected of an intention, that the perſons deſcribed ſhould take beneficially under the wills before they made alliances with the families of their benefactors, but the contrary inference is more ſtrong and reaſonable.

A condition impoſſible *at the creation* is, when the performance of it was not at any period, within the power of the legatee, as in the inſtance of a legacy given to *B.* if he drank up all the water of the ſea.

A condition not impoſſible at its creation, but become ſo afterwards, *by the act of God*, beſides the inſtance before given, may be thus exemplified;—*A.* bequeathed a legacy to *B.* in caſe he married the teſtator's daughter, but before the marriage could take place, the daughter died. Here the condition was good in the commencement, but became impracticable by a ſubſequent and unavoidable event.

A condition not impoſſible at its creation, but afterwards made ſo by the *act of the teſtator*, may be illuſtrated in this manner. A legacy was given to *B.* upon condition that he buried the teſtator in the Cathedral church of Saint Peter, at York; the teſtator afterwards *died excommunicate*, for which reaſon the rites of ſepulture were denied him: In this inſtance the condition was good and practicable in its creation, but became impoſſible to be performed by the ſubſequent conduct of the teſtator.

A condition is conſidered *repugnant to the nature of the bequeſt and contrary to law*, when the reſtraint impoſed, is incompatible with the enjoyment of the legacy in ſo large and ample a manner as the law allows in ſimilar caſes; thus in inſtances where the condition reſtrains the legatee from diſpoſing of his legacy, when the bequeſt to him is abſolute, the condition is void for the reaſon laſt given: for example;—

(*e*) *A.* made the following diſpoſition by his will, "I give and bequeath to my ſon *H. Bradley*, the dividends ariſing from

(*d*) Swinb. pt. 4, p. 240---243, and ſect. 8, p. 250. (*e*) Bradley *v.* Peixoto, 3 Veſ. Jun. CC. 324.

1620l. Bank-Stock, for his ſupport during his life: but at his deceaſe the ſaid 1620l. Bank-Stock, principal and intereſt to devolve to his heirs, executors, adminiſtrators and aſſigns. Having obſerved during the term of my life ſo many fatal examples of parents having left their children in a ſtate of opulence, who have afterwards been reduced to want the common neceſſaries of life, my principal view in this will is, that my wife and children may have a ſolid ſufficiency to ſupport them during their lives. For this purpoſe I will and moſt ſtrictly ordain, that if my wife or any one of my children, ſhall attempt to diſpoſe of all or any part of the Bank-Stock, the dividends from which are bequeathed to them in this will and teſtament for their ſupport during their lives, ſuch an attempt by my wife, or any of my children, ſhall exclude them, him, him, or her, ſo attempting from any benefit in this will and teſtament, and ſhall forfeit the whole of their ſhare, principal and intereſt, which ſhall go and be divided unto and among my other children in equal ſhares, that will obſerve the tenor of this will and teſtament." The bill was filed by *H. Bradley*, againſt one of the teſtator's daughters who had taken out adminiſtration, by which it was prayed, that the defendant might be decreed to transfer the 1620l. Bank-Stock to the plaintiff. The other children were out of the juriſdiction of the court: and by the *Maſter of the Rolls*, "The firſt clauſe is an abſolute gift of the principal and dividends. But then comes this clauſe with which the plaintiff does not comply; and the queſtion is, whether by the rules of this court he can demand the legacy, not complying with the injunction the teſtator has laid upon him, or rather whether the condition is conſiſtent with the gift? Seeing the father's intent ſo clearly and ſtrongly expreſſed, I have taken ſome time to conſider this caſe, and have endeavoured to ſatisfy myſelf, that I am at liberty to refuſe the plaintiff the demand which he now makes. Indeed another reaſon for delaying my judgment was, that there appeared to be other children who were intereſted in this queſtion, and are not parties to the cauſe. The reaſon given for not having them before the court, is, that they are out of the juriſdiction. Had they been in this country, I ſhould have expected them to have been made defendants, to ſuſtain their intereſts: but as they live abroad, the cauſe has proceeded without them, and according to the opinion I have formed of this caſe, they are not neceſſary parties, becauſe I feel myſelf obliged to ſay, that the proviſo, I have before ſtated, is of none effect. I have looked into the caſes which have been mentioned, and find it laid down as a rule long ago eſtabliſhed, that where there is a gift with a condition inconſiſtent with and repugnant to ſuch gift, the condition is wholly void.

A condition that tenant in fee ſhall not alien is repugnant, and there are many other caſes of the ſame ſort, *Piers* v. *Winn*, 1 Ventr. 321. Roll 435. The report in *Ventris* is very confuſed, but it appears clearly, from the report of this caſe in *Pollexfen*, as well as from many other caſes, that the court meant to ſay, that where there is a gift in tail, with condition not to ſuffer a recovery, the condition is void. There are ſeveral caſes of this kind collected in 2 Danv. Ab. 22, which ſhew, that a condition repugnant to the nature of the eſtate given is void: Co. Litt. 223 a, *Dyer* 264, *Mildmay's* caſe, 6 Co. 40. *Stukely* v. *Butler*, Hob. 168, are of the ſame kind, where it was held, that the exception of the very thing, that is the ſubject of the gift, is of no effect. In all theſe caſes the gift ſtands, and the condition or exception is rejected. In this caſe then, I am under the neceſſity of declaring, that this is a gift with a qualification inconſiſtent with the gift, and the qualification muſt therefore be rejected. This is not like *Sockett* v. *Wray* (*f*), 4 Bro. CC. 483, for there the gift was to a *feme covert* for life, and then to ſuch uſes as ſhe ſhould by will appoint. She could appoint by will only, and could not bind her executors by any deed in her lifetime, and I declared in determining that caſe, that I ſhould think otherwiſe in the caſe of a man or any other perſon having an abſolute intereſt. A man could bind his executors, but not a *feme covert*. If this had been a gift to the ſon for life, and after his death as he ſhould appoint, and in default of appointment then to other perſons, I deſire not to be underſtood, that it would not be good: if in default of appointment it was to go to his executors, I ſhould doubt whether it would be ſo: but I give no opinion upon this. Upon the whole I am obliged to hold this condition repugnant to the gift and therefore void."

The above deciſion being founded upon the inconſiſtency between the intereſt which the legatee took in the bequeſt, and the qualification or reſtraint attempted to be annexed to it, it follows, that a condition not to diſpoſe of the legacy may be good, when it and the legacy are not repugnant. Suppoſe then that the legatee, took an intereſt for life only in the bequeſt, and after his death, another perſon was directed to take it by executory deviſe, in ſuch caſe a condition to reſtrain the firſt legatee from alienating the legacy would be conſiſtent and good. Upon the ſame principle, if the condition be not general, but reſtrains the legatee from diſpoſing of his legacy to a *particular perſon*, it will be good, although the legatee may have the abſolute intereſt, for in this inſtance the reſtraint does not preclude him from alienating his legacy, but only impoſes terms upon him, which may be equitable and proper (*g*).

(*f*) *Infrà*. (*g*) Swinb. pt. 4. Sect. 13, p. 271—2 and 3.

Conditions termed *illegal* by the *civil law* may be further conſidered under two heads or claſſes, viz. ſuch conditions as relate to *teſtaments*; and ſuch as concern the *liberty of marriage*.

Firſt: Conditions which relate to teſtaments.

Conditions which (if permitted) would have a tendency to infringe upon the liberty of another perſon's diſpoſition, are conſidered by the civil law as *captious* and void.—Thus if a legacy were given by *A.* to *B.* upon condition that *B.* ſhould leave *A.* the like legacy by his teſtament, ſuch condition would not be ſupported, firſt, becauſe it is conſidered as inconſiſtent with that freedom of will which *B.* ought to poſſeſs at the time of making his teſtament, and ſecondly becauſe ſuch condition is preſumed to be clothed with artifice, and inſerted by *A.* with a view of obtaining an undue advantage over *B.* So odious are theſe conditions to the civil law, that they are declared void, although inſerted in teſtaments *purely military*, or in the teſtaments of fathers providing for their children, or in teſtaments *ad pias cauſas*, and the like. If however, the condition had no reference to the *future act of the legatee*, but the terms of the bequeſt were in ſubſtance as follows, viz. "I bequeath to *A.* 100l. if he has bequeathed to me a like ſum by his will," the condition would be ſupported, as it was apparent that the condition did not in the leaſt interfere with *A.*'s liberty of diſpoſition, and therefore the caſe did not fall within the law of captious bequeſts (*b*).

A ſecond claſs of captious bequeſts depending upon ſimilar reaſoning, is when a teſtament is ſaid to depend upon the will or appointment of another perſon. Accordingly if *C.* bequeath a legacy of 50l. to *A. if B. will*, or, *to ſuch perſon as A. ſhall appoint*, the legacies would be void by the civil law. The firſt ſuppoſitious caſe would be adjudged ſo, for this reaſon, viz. that ancient legiſlators conſidered, that if teſtators were permitted to refer their teſtaments to the wills of other perſons for effect, it would open a ſpring for fraud, by putting it in the power of the perſon depended upon, to diſappoint the perſon intended to be benefitted by the teſtator. The ſecond ſuppoſitious caſe would be adjudged void, becauſe by the civil law teſtators are not inveſted with the power to refer the ſubſtance of their wills, to the *arbitrium* of other perſons, the power of diſpoſition being conſidered as annexed to the *perſon* of the teſtator, and incapable of delegation, except in the particular caſes mentioned in *Swinburne*.

Such being the rule of the civil law concerning bequeſts which it terms *captious*, it may be aſked, whether courts of

(*b*) Swinb. pt. 4, ſect. 22, p. 262.

equity have adopted its reasoning in similar instances? With regard to the first class of these bequests, I have found no case in which those courts have been called upon to decide the question. The reasons given by the civil law for rejecting them are not destitute of policy and wisdom, and therefore intitled to respect. The reason, says *Swinburne*, referring to authorities, why these bequests are called captious, is, "because the testator imposing the condition, endeavours to *catch* or entrap the legatee, by inducing him to give such testator a legacy, in case the legatee dies first, by which mean also the liberty of bequeathing which the legatee ought to enjoy, is destroyed: and as in marriages, the same ought to be free not only from the fear of incurring loss, but also from the apprehension of not obtaining gain, so in testaments the same ought to be made with all freedom, not only divested from the fear of incurring loss, but also without any prospect of gain or reward." With due deference to those reasons, it seems that the law of England allows every person to dispose of his property as he chuses, provided his will be not contrary to legal policy, and fraud is never presumed without proof. No solid objection, therefore, arises to qualify this liberty, in instances where two persons are desirous to create by their testaments a contingent benefit in favour of the one who may happen to survive the other, where no deceit has been practised by either party. It seems however settled, that if two persons enter into a fair and definite agreement, to leave each other a sum of money, or to settle by their wills the property of each for the benefit of the survivor, a court of equity will enforce a performance of such agreement (*i*); and with respect to the second class of captious bequests, it should seem that *A.*'s legacy would vest immediately upon *B.* signifying his assent; and nothing is more frequent in practice than dispositions in trust to *A.* for life, with a limitation after *A.*'s death, for such persons as he shall appoint, the validity of which limitation has never been questioned.

Legacies given to persons with a condition not to dispute the validity, or the bequests of wills or testaments, are not obligatory, but *in terrorem* only; so that if there exist *probabilis causa litigandi*, an endeavour to set them aside will be no forfeiture (*k*). But if the legacies to which such condition is annexed, be limited over upon a breach of it, the non-observance of the condition will create a forfeiture, and for this reason, because immediately upon the breach, an interest in

(*i*) 3 Ves. Jun. CC. 402, 4 Ves. Jun. CC. 160. (*k*) Powell *v.* Morgan, 2 Vern. 90. Norris *v.* Burroughs, 1 Atk. 404. Lloyd *v.* Spillet, 3 P. Will. 344.

the legacy ſprings up and veſts in a third perſon, viz. in the perſon to whom it is given over, ſo that a court of equity cannot, without a violation of its principles, deprive ſuch perſon of his right. Thus,—

(*l*) *A.* a freeman of London, taking notice by his will that he had advanced his only daughter in marriage, gave to her 35l. provided that if ſhe or her huſband refuſed to give a releaſe to his executors after his death, or ſhould any ways trouble or diſturb them, upon any claim or pretence by virtue of the cuſtom of *London*, the legacy of 35l. ſhould go over to the children of his youngeſt daughter deceaſed. The daughter and her huſband claimed by the cuſtom in oppoſition to the will, and it was inſiſted, that as the legacy was given over on the event of the legatee or her huſband making any claim, or diſturbing the executors under pretence of the cuſtom of *London*, a right became veſted in the legatees over, by the claim which had been made, which a court of equity could not diveſt: and the *Maſter of the Rolls* compared it to the caſe of a legacy to a child, upon condition that ſhe married with conſent of the executor, but if ſhe ſhould not marry with ſuch conſent, then the legacy to go over; though this was againſt the rule of the civil law according to which *maritagium debet eſſe liberum*, yet it was a good condition by our law, and when the legacy was once veſted in the deviſee over, equity could not fetch it back again. Alſo there was no colour to help the daughter to her legacy, ſince ſhe had made no claim to it by her anſwer, and as to its being the right of a *feme covert*, all perſonal things were under the power of the huſband who could either releaſe or forfeit them; therefore the court decreed that the daughter and her huſband had forfeited the legacy, by her claiming her orphange part, and by reaſon of the deviſe over.

If, however, the limitation over have no other effect than what would be produced by operation of law, in caſe no ſuch limitation had been made, the expreſs limitation will not prevent the court from relieving againſt a breach in inſtances within its general principle; accordingly if the legacy to which ſuch a condition is annexed, be given by the teſtator to *his executors* upon non-compliance with the condition, the ſecondary bequeſt to the executors would not preclude the juriſdiction of the court from relieving againſt ſuch a breach; for the diſpoſition made on the event of the condition broken, being the ſame which the law would have provided, if no ſuch diſpoſition had been expreſsly made, the principle, which pre-

(*l*) Cleaver *v.* Spurling, 2 P. Will. 526.

vents the interferance of the court in cases where the limitation over is in favour of a stranger, does not apply (*m*).

Secondly, Conditions which relate to the liberty of marriage.

The civil law has been very jealous of all conditions annexed to legacies which imposed restraint upon marriage, as being prejudicial to society in preventing the propagation of the species (*n*). Courts of equity having a concurrent jurisdiction with the ecclesiastical in personal bequests, the former have been biassed in some instances relating to this subject, by the determinations of the latter, for the purpose of preserving uniformity of decision in both courts. It is therefore a general rule that conditions in restraint of marriage are void, so that legacies upon condition *not to marry generally*, or *not to marry without the consent of other persons* without restriction as to time, will be considered absolute, viz. discharged from such conditions whether precedent or subsequent; Thus,—

(*o*) *A.* by her will made the following disposition, "Provided always and it is my will, if my daughter *Mary* marry by and with the consent of the trustees, (therein particularly named,) or the major part of them, and signified in writing before such marriage had, then, and not otherwise, I give and devise unto my said daughter *Mary*, the sum of eight hundred pounds; and it is my will that my said daughter *Martha* shall pay unto my said daughter *Mary* the sum of 30l. yearly, during the said *Mary*'s continuing sole and unmarried, by fifteen pounds each May day, and All Saints day; also I do hereby charge all my aforesaid real estate with all my debts of all kind, and with all my legacies." The testatrix died leaving issue, two daughters, *Martha* and *Mary*; *Mary* married *T. Reynish*, the plaintiff, without the consent of the trustees, and died soon afterwards, but before her death the trustees declared their consent and approbation in writing. The bill was filed by *T. Reynish*, as the representative and administrator of *Mary* his wife, for an account of the personal estate, and that the same might be applied in payment of the legacy of eight hundred pounds, and so much of the arrears of the annuity of 30l, as were due to *Mary* before her marriage; but if the personal estate should not be sufficient, then that so much of the real estate as would make good the deficiency, &c. might be sold, and the money applied for that purpose. The cause being heard at the *Rolls*, and the personal estate not being sufficient the real estate was decreed to be sold for payment of the legacy and arrears of the annuity; from which decree the

(*m*) Cage *v.* Russell, 2 Ventr. 352. (*n*) Swinb. pt. 4 sect. 12, p. 256. Dig. Lib. 35. Tit. 1. de Condit. et Demon. strat. lex. 22.
(*o*) Reynish *v.* Martin, 3 Atk. 330.

defendants appealed to Lord *Hardwicke*, C. who delivered his opinion to the following effect; "As *Mary* married without the consent of the trustees, their consent or approbation afterwards was immaterial, and therefore was not insisted upon by the plaintiff's counsel, because no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it. The general question, therefore, will be, whether under the circumstances of this case the plaintiff as administrator of *Mary* his wife, is intitled to this legacy of 800l. which depends upon these considerations;—*First*, what the event would be if the legacy is considered merely as a personal legacy to be paid out of the personal estate only; *Secondly*, if considered as a charge originally laid upon the lands; and *Thirdly*, supposing the legacy to be merely personal, what remedy the plaintiff has in this court, or in what manner the same ought to be raised. As to the first: I apprehend that taking this as a mere personal legacy, the plaintiff by the rules of the civil and ecclesiastical law, and which have been constantly adhered to in this court, will be intitled to the legacy, for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked upon as a condition, but as a declaration of the testator *in terrorem*. This rule is so strictly adhered to in the ecclesiastical court, that the marrying without consent, is not considered there as a breach of the condition, *although the legacy is actually given over:* but that rule has not been carried so far in this court, for in many instances here, it has been considered as a breach of the condition, and the legacy thereby forfeited, but that differs from the present case, because here the legacy is given to *Mary* only, *without any limitation over*. But then it was objected that there is a strong and material difference between a condition *precedent* and *subsequent*, and this being a condition precedent, and not performed, nothing vested, because the event was not come upon which the legacy was to take effect. Undoubtedly this is true in general both in law and equity; but I do not find, that the civil or ecclesiastical law have made any distinction between conditions precedent and subsequent, but that in both cases the condition as such is merely void. This rule of the ecclesiastical court was strongly relied on in *Harvey* v. *Aston*, 1 Atk. 361, but it was the opinion of all the judges who assisted in that case, that it was not to be carried so far in this court; and the distinction taken by Lord Chief Baron *Comyns*, in his argument in that case is extremely right, and very well reconciles the difference, vide Com. Rep. 738; and the reason is, because the civil law considering the condition, whether pre-

cedent or ſubſequent, as unlawful and abſolutely void, the legacy ſtands pure and ſimple. But in our law where the condition is precedent, the legatary takes nothing till the condition is performed, and conſequently has no right to come and demand the legacy, but it is otherwiſe where the condition is ſubſequent, for in that caſe the legatary has a right, and the court will decree him the legacy, but *this difference only holds* where the legacy is a charge on the *real* aſſets, and therefore if this had been merely a perſonal legacy, I ſhould have been of opinion that as the marriage without conſent would not have precluded *Mary* of her right to this legacy in the eccleſiaſtical court, no more would it have done ſo here, and to this purpoſe ſeveral caſes were cited which are noticed in the caſe of *Harvey* v. *Aſton*, and which I ſhall not repeat, but refer to that caſe for them.—The next conſideration is, what the conſequence will be, taking this legacy as a charge originally laid upon the lands, and not merely perſonal. But before I enter upon that point, it will be proper to conſider how this legacy is given, and in what reſpect it may be conſidered as a charge upon the lands. In the firſt place this is certainly a perſonal legacy, iſſuing out of the perſonal eſtate, and chargeable upon that fund, but then the teſtatrix afterwards at the cloſe of her will, charges all her real eſtate with all her debts and legacies. I will therefore conſider this legacy *firſt*, as if originally charged upon the lands, and *ſecondly*, as if it were not originally charged upon the lands, but the lands charged only as auxiliary, upon a deficiency of the perſonal eſtate. As to the *firſt*, If this had been a legacy originally charged on the land, I do not apprehend that the plaintiff could come here to compel truſtees to raiſe the legacy after a breach of the condition, for the legacy being a charge upon the lands, follows the rule of the common law, and is not cognizable in the ſpiritual court: but where the legacy is merely perſonal, the court follows the rule of the civil law, becauſe perſonal legacies are properly cognizable in the eccleſiaſtical court, and equity has always conſidered itſelf as bound to follow the rules of that court, to which the juriſdiction properly belonged. As in the caſe of bond-creditors, they are conſidered here as having a priority to ſimple contracts, becauſe they have a priority at common law: and the reaſon is, the juriſdiction originally and properly belonging to another *forum*, this court will not break in, but will govern themſelves by thoſe rules which have been eſtabliſhed in that *forum*, to which the juriſdiction properly belongs. For the ſame reaſon, where the legacy is a charge upon the lands, to be raiſed out of the real eſtate, as the eccleſiaſtical courts have no juriſdiction, it muſt be governed by the rules of another *forum*, to which the juriſdiction pro-

perly belongs. This distinction was taken by Lord Chief Baron *Hales*, in the case of *Fry* and *Porter*, 1 Chan. Cas. 142. 'That although in the civil law in the case of a mere personalty the limitation be void, yet this is a devise of the lands not governed by that law.' Estates governable by the common law of this kingdom, without relation to another *forum*, ought not to be influenced by another law; and this being a good condition, it cannot be in law defeated, and there being a full breach of the condition, as *law* will not, *equity* cannot help. In the present case, the lands may or may not be charged; if considered as originally charged, the legacy must be governed by the same rule as a devise of the land itself would have been, without relation to the rules of another *forum*, or being influenced by another law. The case of *King* versus *Withers*, Prec. in Canc. 348, was a devise of 2500l. to the testator's daughter, at the age of twenty-one or marriage; provided she married without the consent of the mother, then 500l. part of the 2500l. was to cease and be applied towards payment of debts: the legacy was charged and chargeable on the real estate, and therefore my Lord *Harcourt* says it must have the same consideration as a devise of lands would have, and he said the rule that had been insisted on, viz. that where there is no devise over, that the condition shall be taken only *in terrorem*, was a great deal too wide, but in that case the daughter having attained 21, one of the times appointed, his Lordship held that she was intitled to the legacy of 2500l. If the legacy therefore in the present case, is to be considered as a charge originally upon the lands, it must have the same consideration as a devise of lands would have, and in that case nothing could be clearer, than that the legacy could not be raised, because nothing vested before the condition performed. It was so held in *King* v. *Withers*, *Harvey* v. *Aston*, and *Fry* and *Porter*. The cases which have been cited *è contra* and come the nearest to the present are, 1 Ch. Ca. 58 *Fleming* v. *Waldgrave*, and *Aston* v. *Aston*, 2 Vern. 452, and the case of *Needham* v. *Vernon*, reported in a book of no authority, called *Reports in Chan. in Lord Nottingham's time*, fol. 62. But all these cases turned upon different considerations from the present, and were determined, either on the particular manner of penning the condition, or because the condition was subsequent, or for some peculiarity in the limitation of the trust. In *Fleming* v. *Waldgrave*, the condition was in case she marries not contrary to the liking of Sir *E. Waldgrave* and his lady, and there certainly is material difference between a condition that the legatary shall not marry without consent, and where it is that she shall not marry against consent. The case of *Aston* v. *Aston* could not be said to be a decree made by any compulsory power of this court, because the legatary either had or had not a right, but although

the portions were decreed, yet the court requiring ſecurity to refund if the condition ſhould be broken, ſhews the opinion of the court, that a breach of the condition would be a forfeiture. Thus the caſe would ſtand, ſuppoſing this to be a legacy originally charged on the lands, but as the real eſtates were not originally charged but only as *auxiliary* upon failure of the perſonalty, and the charge on the lands, depending upon a condition precedent, which never was performed, this cannot be conſidered as a legacy charged or chargeable on the real eſtate, but merely as a perſonal legacy, chargeable on the perſonalty only, and as ſuch to be governed by the rules of that court, which has the proper juriſdiction in ſuch caſes, and therefore this caſe differs from *Yate* v. *Phettiplace*, 2 Vern. 416 (*p*), 'where a legacy of 3000l. was given charged on the real and perſonal eſtate, to be paid at 21 or marriage, if married with conſent, if not, but 1000l. the legatary died at ſix years of age, and adjudged that the portion ſhould not be raiſed for the benefit of her adminiſtratrix,' and very rightly, becauſe in that caſe had the legacy veſted, and it had been charged on the perſonalty only, it would have been tranſmiſſible, but being originally a charge upon the lands, and the legatary dying before the day of payment, it became a lapſed legacy to ſink in the inheritance for the benefit of the heir, and that is now a conſtant rule in equity, eſtabliſhed ſo long ago as the caſe of *Jennings* v. *Looke* (*q*), and the legacy in the preſent caſe depending upon a condition precedent never veſted ſo far as reſpects the real eſtate, but the lands not being originally charged, but only liable to be ſo upon performance of the condition, I am of opinion this caſe muſt be conſidered as a mere perſonal legacy, and as ſuch to be governed by the rules of the civil and eccleſiaſtical law. The third conſideration therefore will be, what remedy the plaintiff will be intitled to in this court? And in regard to that he is certainly intitled to an account of the perſonal eſtate; but as that may be exhauſted by the payment of debts and legacies, the next queſtion will be, whether this court cannot *marſhal the aſſets* in ſuch a manner, as to give the plaintiff a remedy out of the real eſtate, for as the real eſtate is expreſsly charged with the payment of all debts and legacies, and this legacy, by the event which has happened, falls out to be a charge upon the perſonalty only, I am of opinion that the plaintiff ought to ſtand in the place of ſuch creditors or legatees as have received a ſatisfaction out of the perſonal aſſets, and to order it ſo, is the conſtant rule and practice of this court. There is another queſtion in reſpect to the annuity of 30l.

(*p*) *Supra*, cap. v. p. 218. (*q*) *Supra*, cap. Ibid. p. 219.

whether the plaintiff is intitled to the arrears *pro ratâ*, due to *Mary* before marriage, she marrying before the last half year's payment became due? And although this annuity or half-yearly payment is not expressly given for the maintenance of *Mary*, as in the case of *Hay* v. *Palmer*, 2 Vern. 501, yet I am clearly of opinion that it must be so understood, and therefore falls within the reason of that case. Upon the whole I must direct, that the plaintiff be paid the arrears of the 30l. *per ann. pro ratâ* till the time of the marriage, and in case the personal estate should be exhausted by payment of debts or other legacies, that the plaintiff shall stand in the place of such creditors and legatees *pro tanto* as have received satisfaction, and that so much of the real estate be sold, as will be sufficient to satisfy this legacy of 800l. and arrears of the annuity."

Although conditions which restrain marriages *generally* are void, yet conditions which restrain marriages *to* particular persons, or *not* with particular persons are good.—Thus legacies upon condition, that the legatee shall marry the testator's daughter, or this or that woman, or upon condition that the legatee do not marry a particular person, are valid; for in these instances, the liberty of marriage is not absolutely taken away, but a qualification only imposed which may be salutary and expedient (*r*).

Conditions restraining legatees from marrying under 21, or if marrying under 21 or within any other reasonable time, then requiring the consent of parents, trustees, or guardians, are also good conditions, and for this obvious reason; that such conditions in the first case impose no other restraint upon the liberty of marriage than what was before imposed, by the law of this country; and in the second, the condition may be judicious and proper.

(*s*) *B.* bequeathed five-sixteenth parts of the residue of his personal estate to trustees, to lay out the same and pay the dividends, &c. to his daughter *Rachael*, upon her attaining the age of 28 or day of marriage which should first happen, provided she should marry with the approbation of his executors, or such of them as should be then living. He gave the remaining eleven-sixteenth parts among his other four children, and in case either of his sons or daughters should die before his or their part or shares should become payable, then such part or shares should go and be paid among all the rest of his children who should then be living, and the issue of a deceased child or children (if any) *per stirpes* at the same time as their original shares would become due. *Rachael* married *J. Carley*,

(*r*) Swinb. pt. 4, sect. 12, p. 267. (*s*) Hemmings *v.* Munkley, 1 Bro. C. C. 303.

one of the defendants, without the conſent of the executors, and had a child, (to whom *Curley* was adminiſtrator,) and died under 28.—The plaintiffs inſiſted that the portion never veſted in *Rachael*, as ſhe married without conſent, and did not live to attain the age of 28. And it was urged for the defendant, the huſband, the adminiſtrator of his wife and child, that the legacy veſted in *Rachael* upon her marriage, notwithſtanding the proviſo, which was to be conſidered *in terrorem* only, and *Underwood* v. *Morris* (*t*) was cited. But Lord *Loughborough* ſaid, he doubted the authority of the caſe, and decreed that it did not veſt; but there being five children of the teſtator, he held that the infant child of *Rachael* was intitled to one-fifth of the legacy under the bequeſt over: (as being the iſſue of a deceaſed child) and decreed the ſame to her father in her right.

(*u*) *C.* bequeathed 10,000l. South-ſea Annuities, to his executors, upon truſt to pay out of the dividends 100l. a year, for the maintenance and education of his god-daughter *M. C. Tyler*, until her age of 21, and to add the ſurplus of ſuch dividends from time to time to the capital ſtock, and at her age of 21, he willed that one moiety of the 10,000l. with the ſavings, be paid and transferred to his god-daughter, in caſe ſhe ſhould be then unmarried, and that at her age of 25, if ſhe ſhould be then unmarried, the other moiety of the 10,000l. be then transferred to her for her own uſe and benefit: *But in caſe his god-daughter ſhould marry before* 21, *with the conſent of her mother*, he willed that a moiety of the 10,000l. and ſavings, be ſettled upon her for her ſeparate uſe, and her iſſue, in ſuch manner as her mother ſhould think proper, and the other moiety with the ſurplus dividends, be diſpoſed of as his god-daughter ſhould think fit, but if ſhe died before 25 unmarried, then he gave the 10,000l. to her mother *E. Tyler*, for her own uſe and benefit. And after ſome other diſpoſitions, the teſtator gave the reſidue of his real and perſonal eſtate to *E. Tyler*, abſolutely, and appointed her and three other perſons executors. The god-daughter, while an infant married the plaintiff *Scott*, without her mother's conſent, and they inſtituted the preſent ſuit. One of the queſtions was, whether the god-daughter, notwithſtanding her marriage under thoſe circumſtances, was intitled to the legacy of 10,000l. or the aſſignees of *E. Tyler*, the reſiduary legatee who had become a bankrupt? And Lord *Thurlow*, C. expreſſed himſelf to the following effect on this ſubject,—"Queſtion, whether, as this caſe ſtands, the plaintiffs have any, and what intereſt in the 10,000l. South-ſea Annuities? I ſuſpect that the teſtator has failed of expreſ-

(*t*) *Infra.* (*u*) Scott *v.* Tyler, 2 Bro. CC. 431—487.

sing his full intention concerning the 10,000l. he gave it to his daughter on a double contingency: he seems to have meant it for the mother, on failure of them. But he hath given it over to her also, on another double contingency, the death of the daughter before 21, and unmarried. The main argument of the plaintiff turned on this position, that one branch of the contingency, implied a condition in restraint of marriage, which is merely void, and the legacy absolute, and many cases were cited in support of it: but the cases are so short, as to afford no distinct view of the principle on which the rule is laid down. The early cases refer in general to the Canon law, as the rule by which all legacies are to be governed. Towards the latter end of the last, and beginning of the present century, the matter is more loosely handled. The Canon law is not referred to as affording too positive a rule, but these conditions are treated as partaking of the force allowed them by the law of *England*, but at the same time as unfavourable to the good order of society: at length it became a common practice that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to be a testator's intention, to hold out the terror of that which he never meant to happen: but the court has made such conditions amount to no more. Provisions against improvident marriages during infancy or to a certain age, could not be thought an unreasonable precaution for parents: the custom of *London* has been found reasonable (*x*). About the middle of the present century, doubts arose which divided the opinions of the first men of the age. The difficulty seems to have been in reconciling the cases. The prevailing opinion was, that devises of lands should follow the rules of the Common law; and legacies of money the rules of the Canon law. The question remains unresolved; what is the nature and extent of the rule? An injunction to ask consent, is lawful, as not restraining marriage generally. A condition that a widow shall not marry is not unlawful. An annuity during widowhood—A condition to marry or not to marry *Titius*, is good—A condition prescribing due ceremonies and place of marriage, is good.—Still more is a condition good which only limits the time to 21, or any other reasonable age, provided it be not used evasively, as a cover intending to restrain marriage generally. It is agreed on all hands that (however restrictive of marriage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses. The case of *Underwood* v. *Morris* (*y*), by Baron *Parker*, for the Chancellor, does not appear to have been closely considered. I agree with

(*x*) 1 Atk. 379. (*y*) *Infra*.

the late Lords Commiſſioners (z) in denying the authority. It was not contended on the part of the daughter, that if the bequeſt had been *when at* 21 *or* 25, *in caſe ſhe was* unmarried without more, that ſhe could have claimed the legacy; but, becauſe the mother was empowered to accelerate the gift by conſent, it is argued to be indirectly an illegal reſtraint of marriage. I am of opinion, that the daughter having married at 18, improvidently (as far as appears) and againſt the anxious conſent of the mother, never came under the deſcription to which the gift of the 10,000l. South-ſea Annuities was attached. It is therefore void, and part of the reſidue, and belongs to the aſſignees of the mother."

(*a*) *D.* by his will deviſed his real eſtates to the uſe of his eldeſt daughter and her huſband, for their lives and the life of the ſurvivor, remainder to the uſe of the ſons of the daughter as therein mentioned, remainder to the uſe of this ſecond daughter and her huſband and ſons in the ſame manner, with remainder to the uſe of his third daughter *L. Wentworth*, or ſuch perſon, if any, with whom ſhe ſhould firſt intermarry, (if before ſhe attained 21, then with the conſent and approbation of his truſtees or the ſurvivor and his heirs, ſuch perſon making a competent ſettlement upon her, to the ſatisfaction of his truſtees) for their joint lives and the life of the ſurvivor, remainder to the ſons of the daughter as therein deſcribed, with remainder over. Towards the concluſion of his will, the teſtator gave *L. Wentworth* a legacy of 10,000l. "payable and to be paid to her in manner following, that is to ſay, the ſum of 5000l. upon her marriage, (with ſuch conſent and approbation as aforeſaid) and the ſum of 5000l. within two years next afterwards." *L. Wentworth*, while an infant, and a ward of the court of chancery, went to *Scotland* with the plaintiff, and they were there married without the conſent of the truſtees; and one of the queſtions was, whether under theſe circumſtances the plaintiff and his wife were intitled to the legacy of 10,000l. and to have a moiety paid immediately? And Lord *Loughborough* C. "As to the legacy this has been long *vexata queſtio*. It is impoſſible to reconcile the authorities, or range them under one ſenſible, plain, general rule: there can be no ground in the conſtruction of legacies, for a diſtinction between legacies out of perſonal and out of real eſtate. The conſtruction ought to be preciſely the ſame. I do not ſee more importance in reality in the diſtinction between conditions precedent and ſubſequent. The caſe of all theſe queſtions is plainly this. In deciding queſtions that ariſe upon legacies out of land, the court

(z) In the laſt caſe. (*a*) Stackpole *v.* Beaumont, 3 Veſ. Jun. CC. 89.

very properly follows the rule that the common law prescribes, and common sense supports, to hold the condition binding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the court felt the difficulty upon the supposition, that the ecclesiastical court had adopted a positive rule from the civil law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction, in the resort to this court instead of the ecclesiastical upon legatory questions; which after the restoration was very frequent, and in the beginning embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how in a *Christian* country they should have adopted the rule of the *Roman* law, with regard to conditions as to marriage. *First*, where there is an absolute unlimited liberty of divorce all rules as to marriage are inapplicable to a system of religion and law where divorce is not permitted. *Next*, the favour to marriage, and the objection to the restraint of it was a mere political regulation applicable to the circumstances of the *Roman* empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it, led to habits of celibacy. In the time of *Augustus*, the *Julian* law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy, (it is an old expression) and for the encouragement of all persons who would contract marriage, it necessarily followed that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction that these conditions were null (*b*). It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion as to the time and circumstances of the marriage, their children or objects of bounty may contract. It is perfectly impossible now whatever it might have been formerly to apply that doctrine not to lay conditions to restrain marriage under the age of 21 to the law of *England*,

(*b*) See Ld. Ch. Baron Comyn's account of these conditions in Harvey *v.* Aston, *infrà*.

for it is directly contrary to the political law of the country. There can be no marriage under the age of 21, without the consent of the parent (*c*). This testator places trustees in the room of a parent, and gives *quoad* the marriage the authority to them. I am now called upon to pronounce, that this condition is bad because it is *illegal* to impose a condition in restraint of marriage. What: illegal here! I have committed this gentleman for marrying without consent. It is impossible to say, that a condition has any stamp of illegality, impolicy, or impropriety, that does no more than add an extension of bounty to induce them to do that which neglecting to do, the husband becomes an object of the censure of this court, and liable to punishment. Therefore, I am perfectly free in this court in a case where the condition only operates up to the age of 21, and requires no more than the general policy of the law, and course of this court hold to be proper, to say, there is nothing illegal in such a condition, and therefore not to determine, that this legacy, which the testator directs to be paid only under certain circumstances, shall be paid, not only though those circumstances have not happened, but where every thing has been done directly in opposition and defiance of the directions of the will. Confined, therefore, to such cases, where the restraint operates only up to the age, till which by the law and policy of the country, consent is necessary, I have no difficulty to say, there is no authority to lead the court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. In *Scott* v. *Tyler*, 2 Bro. CC. 431. (*d*), there is a very accurate though not a very extended opinion of Lord *Thurlaw*, which carries conviction along with it. The question is, not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given, have put themselves in a situation to answer that description of the person to take. *There is no gift here but in the direction to pay*, for I cannot stop in the middle of a sentence. He gives her 10,000l. that is in effect two sums of 5000l. one payable upon her marriage with consent: she has not married with consent; she has married without it; can she claim the 5000l. under the will? I do not see the great importance of the distinction upon a bequest over of the legacy (*e*). It is one of the points that occurred to judges sitting here, to deliver them from the difficulty arising from the rule of the civil law, adopted without seeing the ground and the reason of applying it to this country under different circumstances. The authorities stand so well ranged, that the court would not appear to act too boldly which ever

(*c*) 26 Geo. 2. c. 33. (*d*) Last case. (*e*) See Lord Hardwicke's reason in *Wheeler* v. *Bingham*, *infra*.

ſide of the propoſition they ſhould adopt: but I have always upon repeated conſideration thought, there was not much reaſon in any of the determinations founded upon a rule, applicable to the laws of the country from which it is taken, but not to this country, and rejecting theſe conditions as inapplicable to a country which adopts them as to real property, and where the reſtraint impoſed is analogous to the political regulation of the country upon the ſubject; and here I am deciding upon the plaineſt circumſtances for the condition is reſtrained to the age, before which by the law of this country a marriage cannot be had without conſent, therefore declare her not intitled to this legacy."

The condition of marriage with the conſent of parents, truſtees, or guardians, is generally confined to the time of the legacies veſting, ſo that if there were two periods mentioned in the will for payment of the legacies, viz. at 21 or marriage with conſent; if the legatees attained 21, the condition requiring marriage with conſent, would become of no effect, conſequently ſubſequent marriages without conſent, would be no forfeiture of the legacies. Thus,—

(*f*) *A.* bequeathed to his executors South-ſea ſtock, and annuities in truſt, to apply the dividends for the maintenance of the plaintiff, his grand-daughter, until ſhe ſhould attain 21, or be married; and to the intent that they ſhould transfer the ſaid ſtock and annuities to her *when ſhe ſhould attain the age of* 21, *or be married with the conſent of A. and B.* But in caſe ſhe ſhould marry without the conſent of *A.* and *B.* then the executors were to pay her the dividends for life, and after her death tranſfer the ſtock and annuities to her children, and if ſhe died without iſſue, then to go over. The grand-daughter having attained 21, brought her bill to have the ſtock and annuities transferred to her, which was oppoſed by the remainder-man, who inſiſted, that in regard the plaintiff was not married, and if ſhe married without the conſent of *A.* and *B.* which poſſibly might happen to be the caſe, then ſhe was only to have the dividends for her life; therefore the ſtock and annuities ought not to be abſolutely veſted in her. But the *Chancellor* was of opinion, that the plaintiff having attained 21, ſhe had an abſolute intereſt veſted in her, and the teſtator having expreſsly directed that the ſtock and annuities ſhould be transferred to her when ſhe was 21, *the condition annexed to her marriage muſt be reſtrained to her marriage before* 21; for if the ſtock and annuities were transferred to her at 21, as the will

(*f*) Deſbody *v.* Boyville, 2 P. Will. 547. alſo King *v.* Withers, cited by Lord Hardwicke, in Reyniſh *v.* Martin, *ſupra*. Pullen *v.* Ready, 2 Atk. 588. S. P.

ſaid they ought to be, the executors, in caſe ſhe ſhould afterwards marry without the conſent of *A.* and *B.* could not after her death transfer the ſtock to her children, or if no iſſue, to the remainder-man; from whence it was plain that the teſtator could not intend there ſhould be any forfeiture, but only in caſe the grand-daughter ſhould have married without conſent under 21; and therefore the ſtock and annuities were decreed to be transferred to the plaintiff.

(*g*) Lord Chancellor *Camden*; "*Noyes* having five children at the time of his will, gave them by name 1500l. each, to be paid to his daughters reſpectively *at the time of their ſeveral marriages, with the conſent of his executrix and executor, or the ſurviver*, and if any of them ſhould marry without ſuch conſent, then he gave her or them ſo marrying reſpectively, 500l. only, and he gave the 1000l. to ſuch of his daughters, as, and when they ſhould marry with ſuch conſent in equal proportions. *Mary*, one of the daughters having attained 21, died unmarried. Queſtion, whether the portion ſurvived? Or in other words, whether the time of payment is confined merely to marriage? If I ſhould determine for the plaintiff it will be with reluctance. It is very unnatural for a parent to impoſe a conſent to marriage during his daughter's whole life. To conſider it upon the will, which I ſhall conſtrue with liberality. Theſe portions clearly veſted at the death of the teſtator, and if they had not been deviſed over, I ſhould think that in caſe any of the daughters had died before the time of payment, the portion would have gone to her repreſentative: but ſtill the queſtion is, whether marriage is the ſole time of payment? A material obſervation ariſes on a clauſe in the will, by which the teſtator appointed the ſame perſons who are executors to be *guardians* of his daughters during their minority. It is a fair conſtruction to ſay, that he appoints the guardians merely with a view to their conſent, and the ſame as if he had inſerted that clauſe, in the clauſe of conſent. The clauſe of maintenance and education is alſo material: *till portions become payable*, muſt be underſtood *till* 21, *or marriage with conſent*. Maintenance and education are confined to minority, and though there may have been a caſe where under the word *education*, the proviſion has been extended after 21, yet that muſt have been a very ſpecial caſe and contrary to the natural ſenſe of the words. If this conſtruction be right, it puts an end to the queſtion; becauſe the condition of marriage with conſent, muſt mean at an earlier time than 21."

Upon the ſame principle, if a legacy were directed to be paid at the expiration of a year after the teſtator's death, with a con-

(*g*) Knapp v. Noyes, Ambl. 662.

dition of revocation annexed, if the legatee married *B.* Should the legatee ſurvive the time of payment, viz. the year, and then marry *B.* ſhe would be intitled to the legacy, notwithſtanding the marriage.—Accordingly,

(*h*) *A.* beqeathed to his daughter *Mary* 400l. to be paid within twelve months after his death, but if ſhe married *J. Oſborn*, of, &c. then he revoked and made void the legacy, and gave her in lieu of it one ſhilling and no more. *Mary* continued unmarried about fourteen months after the teſtator's death, and then married *J. Oſborn*. The executor refuſing to pay the legacy, *Mary* and her huſband inſtituted the preſent ſuit. And it was contended for her that this was not a condition precedent, and therefore not like the caſe of *Scott* v. *Tyler*, 2 Bro. CC. 431 (*i*). But that ſhe was intitled to be paid the legacy at the end of twelve months after the teſtator's death, or if not intitled to payment at that time, merely becauſe ſhe had not then quite attained twenty-one, ſhe had a right to have it appropriated and laid out for her benefit. And by the *Chancellor*, "She certainly had; the caſe cited has no analogy to this. This is not the caſe of a condition precedent. In this caſe I can only refer the event, in which the legacy was to be revoked, to the time during which the payment was ſuſpended. That reſults from the manner in which the legacy is given and the time at which the payment of it is directed. If the legatee had come unmarried at the expiration of a year, what objection could have been made? Her ſubſequent marriage cannot in this caſe alter her right." His Lordſhip, therefore, decreed payment of the legacy with intereſt.

The rule is the ſame in other inſtances beſides thoſe which relate to reſtrictions upon marriage, ſo that if a legacy were given to *B.* to be paid within ſix months after the teſtator's death, and in another part of the will it was declared, that if *B.* died before twenty-one, the legacy ſhould go to *C*; the contingency of *B.* dying under twenty-one, would be confined to the period of ſix months after the death of the teſtator; whence it follows, that if *B.* ſurvived the ſix months, he would be intitled to the legacy, although he might die under twenty-one. To illuſtrate this by example,—

(*k*) *A.* bequeathed to his two youngeſt daughters, *Eſther* and *Margaret Bridges*, 600l. a-piece, to be paid within ſix months after his death, and after making other diſpoſitions by his will, he declared, that if either or both of his daughters died before they accompliſhed their ages of twenty-one, he gave as far as in law he might, the portion or portions of her or them

(*h*) Oſborn *v.* Brown, 5 Veſ. Jun. CC. 527. (*i*) *Supra*. (*k*) Clent *v.* Bridges, Finch. Rep. 26.

ſo dying to be equally divided between the ſurvivor of them and his ſon *E. Bridges*, and all the children of his daughter *S.* as ſhould be then living, (who were the plaintiffs) and appointed *M. Bridges* ſole executor. The executor gave the two daughters bonds for the payment of their legacies, who gave him proper diſcharges, and he paid them the intereſt. *Margaret* having attained the age of twenty and eight months, and being unmarried, made her will, by which ſhe gave the greateſt part of her portion to her relations, and appointed her ſiſter *Eſther* executrix, and died under twenty-one. The queſtion was, to whom the 600l. given to *Margaret* belonged, the plaintiffs claiming it under the latter clauſe of the teſtator's will, and the defendant *Eſther* claiming it as executrix of *Margaret*'s will? The cauſe being heard by lord *Shaftſbury*, he decreed, that as *Margaret* died before twenty-one, her portion was diſtributable among the plaintiffs, purſuant to the direction in the teſtator's will. But upon a rehearing before lord keeper *Nottingham*, aſſiſted by *Rainsford* and *Wild*, Js. they were all ſatisfied, that the ſecurity given by the executor was both in law and equity a good payment of the portion, and that the will having once taken its full effect, by payment of the 600l. to *Margaret* at the time appointed, viz. *at the end of ſix months after the death of the teſtator*, the property of that 600l. was ſo abſolutely veſted in her by that payment, that it could be no longer ſubject to the latter contingent clauſe in the will of her father. For where a certain and determinate time was appointed for the payment of a legacy, and afterwards a contingent clauſe was added touching the ſame legacy, all the words in the will muſt ſtand together, which could never be unleſs the contingency happened within that period of time appointed for the payment of it; for if it happened after the time it was vain and idle, and could not controul the property of a perſonal chattel or of money executed by payment; and that the teſtator in this caſe ſeemed to be ſo adviſed, when he qualified the contingent clauſe by the words, "if the law would allow it," otherwiſe *Margaret* muſt in effect become a truſtee of her own money, and when ſhe had it, ſhe muſt not uſe it till ſhe was twenty-one, which would be a very hard conſtruction. That it would be harder to diſable her to diſpoſe by her will, what ſhe might have ſpent or given away in her lifetime, and the laſt decree allowed 180l. of the money to be well ſpent, whereas in ſtrictneſs either the whole was ſubject to the contingent clauſe, or no part of it. Wherefore upon the whole matter, the court ſaw no reaſon why the property of the money once paid to *Margaret*, ſhould remain ſubject to any qualification or contingency, but that the money was well diſpoſed of by her will. They therefore diſmiſſed the bill of the plaintiffs.

A legacy from a husband to his wife, is a further exception to the general rule, in consequence of the particular interest he is supposed to have in her continuing a widow; if therefore a bequest were made by him to his wife, if she continued his widow, or so long as she should continue his widow, the condition would be good.

(*l*) *A.* bequeathed the clear surplus of his estate to the plaintiff his wife, and to his eldest son *John*, to be equally divided between them, and appointed them executors. He then desired that his wife should continue his widow, but if she married again, his will was, that she should render the right of being executrix to his son *Roger*, to be partner with his brother *John* in the executorship. The plaintiff, the widow, married again, and the question was, whether by such marriage she forfeited her share of the surplus? And the *Master of the Rolls* was of opinion, that she not only lost her share of the surplus, but also her right to the executorship, and dismissed her bill.

Another exception to the general rule exists, when the legacy is *given away* from the legatee *upon non-compliance with the condition*, although the civil law has admitted no such exception. The reason seems to be the same as already noticed in the instance of conditions not to dispute the validity of wills, when the legacies were given over in the case of a breach of them.

(*m*) *A.* a citizen of London, having issue a son and daughter, bequeathed two thirds of his legatory part to *B.* his daughter, but if she married without the consent of her mother, then *C.* his son, was to have 500l. part of the legacy. *B.* married without obtaining her mother's consent, and it was determined that the above clause should not be considered *in terrorem* only, for upon *B.*'s marriage without consent, an interest vested in the son, who was to be looked upon as a person the testator considered, and had in contemplation as well as *B.*

A case, determined by Baron *Parker*, which seems to contradict the doctrine last mentioned, is proper to be noticed in this place. It was to the following effect:

(*n*) *A.* bequeathed to his daughter *B.* 2000l. to be paid at twenty-one or marriage, if she married with the consent of his executors, and after giving several legacies to his other children, he declared that if either of the legacies died before their legacies became payable, such legacies should be divided between the survivors of her brother and sisters. *B.* married at

(*l*) Barton *v.* Barton, 2 Vern. 308. Also Swinb. pt. 6. sect. 11. Godolph. Orp. Leg. 45. Scott *v.* Tyler, *supra*. (*m*) Stratton *v.* Grymes, 2 Vern. 357. also Chauncy *v.* Graydon, *infra*, Scott *v.* Tyler, *supra*. Harvey *v.* Aston, 1 Atk. 375. 377. *Infra*. (*n*) Underwood *v.* Morris, 2 Atk. 184.

fifteen without the assent of the executors, and the question was, whether as *B.* married while an infant without the consent of the executors, such marriage was not a forfeiture of the legacy to the legatees to whom it was given upon the happening of that event? But by *Parker*, B. "It is objected that the time of payment is not come, because it is a marriage without consent of trustees, and that it must wait the event of *B.*'s attaining her age of twenty-one. But as this is a mere personal legacy, I am of opinion it is a devise *in terrorem* only, and that it vests absolutely in the daughter, and that marriage, one of the contingencies upon which it became payable, having happened, the executors must be decreed to pay it to the plaintiffs with interest, &c."

It is obvious that this case is clearly within the reason of that class of cases in which courts of equity have not adopted the above rule of the civil law. It seems, however, to be of no authority, and was so considered by Lord *Loughborough* in *Hemmings* v. *Munkley* (*o*), and by Lord *Thurlow* in *Scott* v. *Tyler* (*p*).

A further exception to the general rule of the civil law, in regard to the invalidity of conditions which restrain the liberty of marriage, has been established by great authority, in instances where there are two provisions for the legatee in the same will, but one is made to depend upon a marriage with consent, as a *precedent* condition; in this case if the legatee marry without the required consent, the gift to arise upon that contingency will be disappointed. This will appear more clearly from the following case.

(*q*) *A.* bequeathed an annuity of 10*l.* to his grand-daughter for life, and afterwards by a codicil declared, that if his grand-daughter should marry with the good liking of his trustees, she should have 150*l.* in lieu of the annuity, and the annuity was to cease. The grand-daughter married without the consent of the trustees, and upon its being objected that the restraint of marriage was *in terrorem* only, Lord *Cowper*, C. decreed the contrary, saying, that there was a provision made either way, and where the provision for the child was in the alternative, and there was a condition *precedent* to the gift of the portion, viz. *if she married with consent*, &c. and that was not performed, and the child was still provided for, though not with the greater portion, equity, in that case, did not relieve.

In the case last stated, we observe that Lord *Cowper* lays down the doctrine distinctly and without qualification, as applying to cases of conditions *precedent*; yet an instance is not

(*o*) *Supra*. (*p*) *Supra*. (*q*) Gillet v. Wray, 1 P. Will. 284. Also Creagh v. Wilson, 2 Vern. 572. SP.

wanting to shew that such a condition in a similar instance has been adjudged void in analogy to the rule of the ecclesiastical court, though it is probable that the decision of Lord *Cowper* will be followed, as the present tendency of courts of equity is to support those conditions. The case alluded to was as follows;—

(r) Five hundred pounds were bequeathed to the plaintiff's wife if she married with the consent of trustees, and in case she did not, then 20*l.* *per annum* for life. She married without the consent of the trustees, and her husband, the plaintiff, preferred his bill for the 500*l.* And it was argued for the defendant, that this differed from the common case of a devise upon condition *in terrorem*, for it had always been held that where there was a devise over to a third person for non-performance of the condition; if the party married without consent, &c. all should go over to the third person, because he had a conditional interest by the will; and if there were no devise over, then it was esteemed only *in terrorem*, and the person should have the legacy, notwithstanding the breach of the condition; but here this was tantamount, or as strong as a devise over, when the party himself said, that if she married without consent, she should have but 20*l.* *per ann.* To which it was answered by the *Chancellor*, that this did not differ from the reason of the common case of a devise *in terrorem*, and the reason he had from Lord C. J. *Hale*, who (when it was objected in another case, that this court would not make men's wills, and give their estates contrary to their intentions) answered, that this court held pleas of legacies, and judged of them by the rules of the *civil* law, and by that law any condition added to restrain marriage was void; so that where an interest did not accrue to a third person by a breach of the condition, such a condition was void, and only *in terrorem*. Therefore the 500*l.* was decreed to the plaintiff.

It seems, however, that when the condition requiring marriage with consent is *subsequent*, so as to permit the original or first legacy to vest, and there is no limitation over upon a breach; whether the provisional or second legacy be a mere substitution, or be in abridgment of the first, the breach of the condition will not be allowed to divest the legacy already vested. In illustration of this,—

(s) *A.* bequeathed 3000*l.* to his daughter, the plaintiff's wife, at twenty-one or marriage, and recommended her to the care of one *S.* his friend, provided, that if she married without

(r) Hicks *v.* Pendarvis, 2 Eq. Ca. Abr. 212. (D) pl. 1. See also Reynish *v.* Martin, *supra*, and the observations in Wheeler *v.* Bingham, *infra*. *(s)* Garret *v.* Pritty, 2 Vern. 293.

the consent of *S.* her legacy was to cease, and she to have but 500l. and made the defendant his executor and residuary legatee. The daughter married without the consent of *S.* and yet the court decreed her the 3000l. with interest from the marriage, and principally, because it was not expressly bequeathed over, but to fall into the residue.

(*t*) *B.* bequeathed to each of his grand-daughters, who should be living and unmarried at the time of his death, on their respective days of marriage 1500l. and he desired that none of his grand-daughters should marry without the consent of the father and mother, or the survivor of them; and therefore if any or either of them married without such consent, then he revoked what was directed to be paid to such grand-daughter or grand-daughters, and such of them should not be intitled to any benefit by virtue of his will, further than what the father and mother or the survivor should direct; and he afterwards directed, that after the several legacies and sums ordered to be paid were satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter *Philadelphia* for life, and after her death, to the defendant *Bingham* and his heirs. The plaintiff, one of the grand-daughters, married without the consent of her father and mother, and filed her bill for the legacy. And by Lord *Hardwicke*, C. "In the present case, the direction the grandfather has given by his will, that the grand-daughter should take the advice of parents was a very wise one, and what the mother has done appears so reasonable, that if I could consistently with determinations of this court, and the matter was *res integra*, I would go as far as possible to support it. But notwithstanding such inclination, I cannot hold this portion to be in the power of the mother, to be disposed of in the manner she has done, for it would shake the settled rules of the court. The first question is, whether this condition is an effectual condition, or *in terrorem* only? Secondly, whether here is that which amounts to a bequest over of the legacy? As to the *first*, in order to prove it is a condition that ought to have its effect, it is said by the defendant's counsel, it amounts to the same thing as a condition *precedent*, and therefore the party claiming must shew it performed. Two answers may be given to this. It is clearly a *personal* legacy, and the personal estate is sufficient to satisfy the whole, and consequently is no charge on the real estate. It has been laid down in *Harvey* v. *Aston* (*u*), by Lord Chief Baron *Comyns*, that the civil law makes no difference between conditions precedent and subsequent, but holds it to be a void condition equally

(*t*) Wheeler *v.* Bingham, 3 Atk. 364. (*u*) *Infra*.

in both. There have been several cases in this court of a personal legacy, where if it has not been given over, though a condition precedent, yet it will not be effectual to defeat the legacy. But I take this to be a condition *subsequent*, for when the event happens it is vested. A distinction has been attempted here that a breach of the condition happening, *eo instante*, the legacy vests, it is therefore void. But though they meet together at the same time, yet they are considered in point of law as subsequent in the order of things. It has been truly said, that she need not shew in the ecclesiastical court any thing but the marriage, and the objection must come from the other side, and *prima facie*, it was sufficient for her to shew the legacy, and that she is such a grand-daughter as is described in the will. Therefore I am of opinion the attempting a distinction from former cases, to make this a condition precedent will not prevail. But it has been said, if there be not a condition precedent but subsequent, yet it amounts to the same thing as a devise over, by reason of the strength of evidence of the testator's intent that the legacy should cease. I am of opinion this is not the reason that has governed the court. There have been abundance of cases here where the intention of the testator was full as strong, that the legacy should cease, as in the case of *Garret* v. *Pritty* (*x*), and yet the intention only did not prevail. The true ground upon which this court has suffered the condition to effectuate, is not the intention but *the right of a third person*, the being given over, and vesting in that third person, if the condition is not performed. If that be so, the next consideration is, whether here is in the present case, what amounts to a devise over to a third person in point of right. I am of opinion there is not. The gift to the trustees is not of a particular fund, but of his personal estate in general. Then afterwards follows, *it is my desire that none of my grand-daughters should marry without the consent of the father or mother*, &c. then comes another clause which says, *that after the several legacies and sums directed to be paid and satisfied, if any sum of money should remain in the hands of the trustees*, &c. *the same should be paid to his daughter Philadelphia for life*, &c. Upon these two clauses, and the clause of revocation the question of *bequest over arises*. It has been insisted by the counsel for the defendant, that the plaintiff not having any further benefit than what the father or mother or the survivor of them should direct, amounts to a devise over. But I am of opinion it does not. If it had been said upon her marrying without consent, I revoke that legacy, and give the 1500l. to the father or mother to dispose of, it would have been a devise over; but this is only

(*x*) Last case.

putting it in the power of the father or mother or the ſurvivor to *abridge* the legacy given to the daughter, and when it ſhould be ſo abridged, the remainder would have fallen into the reſidue. The authorities are moſt clear in the caſe of *Garret* v. *Pritty*, and *Bellaſis* v. *Ermin*, 1 Ch. Ca. 22. If the teſtator himſelf had abridged this legacy, it would have been no more than *in terrorem*, and conſequently delegating it to another to do it, will carry it no further. The clauſe, (if any ſum of money ſhould remain in his truſtees hands, the ſurvivors or ſurvivor, he directs the ſame ſhould be paid to his daughter *Philadelphia* for life, and after her death, to the defendant *Bingham* and his heirs) has been made uſe of on both ſides, the firſt part of it by the plaintiff, and the latter by the defendant. The words preceding, when the *ſeveral legacies ſhall be fully paid and ſatisfied*, ſay the plaintiff's counſel, mean, when all the ſums before given ſhall be paid, and therefore nothing is given over, till all the ſums are paid. That can never be the meaning, but what the defendant's counſel have ſaid is the right conſtruction, when they ſhall be paid *according to the directions of the will before mentioned.* The other words made uſe of on the part of the defendant are, *particular declarations of particular ſums of money.* If this had been a particular fund which is given to his truſtees, as certain ſtocks, or certain mortgages, and the will had ſaid, the legatee ſhall have no more than the father and mother ſhould appoint, then I think it would have been a gift over of the remainder of that particular fund: but this is only a deſcription of the *reſiduum* of the perſonal eſtate in the hands of his truſtees. Then the obſervation I have made brings it to the rules of this court, and I am of opinion an expreſs deviſe, that if the legatee ſhould not perform the condition, the legacy ſhall ſink into the *reſiduum*, amounts to a deviſe over, but there is no ſuch direction here, and therefore, though there is nothing unreaſonable in the reſtriction, and though what the mother has done is prudent, yet I cannot conſtrue it to be a forfeiture of the legacy without ſhaking the authority of all the other caſes, and conſequently muſt decree the legacy to the plaintiff."

Whether an expreſs deviſe over of the particular legacy is neceſſary to give effect to the condition, or the mere diſpoſition of it in a general reſiduary clauſe is ſufficient, ſeems to be attended with conſiderable doubt. In *Amos* v. *Horner* (*y*), the *Maſter of the Rolls* thought that a reſiduary diſpoſition was enough, but it ſeems that no reſolution was made, as the cauſe went off for want of parties, and never came on again (*z*), and it has been conſidered of no authority by ſubſequent judges. In *Paget* v. *Haywood*, mentioned by *Willes*, C. J. in *Harvey*

(*y*) 1 Eq. Ca. Ab. 112. (*z*) Forreſt. 216.

v. *Aſton* (*a*), it was held that a general deviſe of the *reſiduum*, or a deviſe to the perſon intitled to the *reſiduum* were the ſame, as if there was no bequeſt over at all; and in *Semphill* v. *Bailey* (*b*), in the Duchy Court, *Lechmere*, C. *King*, C. J. and *Dormer*, J. were of the ſame opinion in regard to the effect of a mere general reſiduary bequeſt. Yet in the caſe of *Wheeler* v. *Bingham* (*c*), Lord *Hardwicke* declared his opinion, that an expreſs deviſe, that if the legatee ſhould not perform the condition, the legacy ſhould ſink into the reſidue, would amount to a deviſe over. But Lord *Thurlow*, in *Scott* v. *Tyler*, as ſtated in Mr. *Dickens'* Reports (*d*), is aſſerted to have ſaid, "the will before us contains a reſiduary bequeſt, but that has been repeatedly and well enough determined, to leave the conditional legacy in *ſtatu quo*. It only prevents that which has not been diſpoſed of already, whatever be its amount, from falling by order of law to the executor or next of kin."

Upon the whole, notwithſtanding what is declared by Lord *Hardwicke* in *Wheeler* v. *Bingham* (*e*), it ſeems to be ſettled, that whether no mention of the legacy be made, but it is left by the teſtator to become part of the reſidue upon a breach of the condition, if the condition were effectual; or whether it is declared by the teſtator to conſtitute part of his reſiduary eſtate upon ſuch a breach; in the latter as well as in the former inſtance, the condition would be void, becauſe the direction of the teſtator would have no other effect than what the law would give, in caſe the teſtator had been ſilent upon the ſubject (*f*).

When legacies are *charged* upon *real eſtate*, or are directed to be paid out of that fund in the *firſt inſtance*, as the eccleſiaſtical court has no juriſdiction in ſuch caſes, courts of equity have conſidered themſelves diſentangled from the eccleſiaſtical rules; they have therefore adopted thoſe of the common law, and given full effect to conditions in reſtraint of marriage, when not improperly impoſed without making any difference whether there was a limitation over upon a breach of the condition or not.

(*g*) *A.* charged his real eſtate with 500l. to be paid to his ſiſter *A. Herne*, within one month after her marriage, but ſo as ſhe married with the approbation of his brother *J. Herne* (if living) and in caſe ſhe married without his conſent, the 500l. was not to be raiſed. *A. Herne* married in the life of *J. Herne*, but without his conſent, and the queſtion was, whether ſhe was intitled to the 500l.? for it was ſaid, that this was a condition

(*a*) 1 Atk. 378. (*b*) Ch. Pre. 562—4. (*c*) *Suprà*. (*d*) P. 723. (*e*) *Suprà*. (*f*) See alſo Reves *v.* Herne, *infrà*. (*g*) Reves *v.* Herne, 5 Vin. Abr. Tit. "Condition" Zd. pl. 41. Alſo Reyniſh *v.* Martin, *ſuprà*.

in terrorem only, and that the conſtruction of ſuch conditions had always been, that where there was no deviſe over, ſuch condition was void, otherwiſe where limited over, and here it was not. To which it was anſwered, that this was a condition precedent, and nothing aroſe or became due, but upon marrying with conſent; and this being a deviſe of money out of land, or of a charge upon the land, it was to be conſidered as a deviſe of land, &c. and governed by the ſame rules, and then being a plain condition precedent, nothing aroſe, &c. And the *Maſter of the Rolls* ſaid, that the civil law made no diſtinction in *perſonal* legacies, between conditions precedent and ſubſequent, neither did this court as to mere perſonal legacies, given upon condition of marrying, &c. with conſent, &c. But this court differed from the civil law in this, that by that law all conditions in reſtraint of marriage were void, but this court ſaid they are not void where the legacy is given over, and another perſon particularly ſubſtituted by the teſtator to have the benefit of it in caſe the condition be not complied with, but this muſt be *a ſpecial nomination as a legatee*, and therefore a *reſiduary legatee* or executor ſhould not have the benefit of ſuch non-performance, and he remembered a caſe to this purpoſe, where a legacy was given upon ſuch condition of marrying with conſent, and if not, *that it ſhould ſink into the reſidue of the teſtator's eſtate, which he gave to J. S.* &c. It was held that though the marriage was without the conſent, yet the legacy was not loſt, becauſe it would have been the ſame if the teſtator had ſaid nothing about its ſinking into the reſiduum, and therefore was conſtrued *in terrorem* only. So it was in the caſe of *a truſt of a term limited of lands for raiſing portions with ſuch reſtriction*; this court governing itſelf by the ſame rules, as in caſe of a deviſe of a legacy with ſuch condition, for though the term was a legal eſtate and intereſt, yet the *truſt of a term was a creature of equity only*. But it was otherwiſe in caſe of a deviſe of lands; there conditions precedent and ſubſequent take place, &c. (and that this was *Fry* and *Porter*'s caſe, of an infant bound by condition relating to her marriage, being a condition precedent), and held that the preſent caſe being a charge upon land, was to be governed by the ſame rule, and was to be conſidered as land; the will muſt be atteſted in the ſame manner, &c. That this being plainly a condition precedent, and nothing veſted (as in caſe of a truſt term where the term is veſted, and the truſt only left open), it was too hard for this court to charge the land contrary to the expreſs will of the teſtator, and to ſay the money ſhould be raiſed when the teſtator ſaid it ſhould not, and held that a charge on the land could not ariſe, &c. otherwiſe than as a deviſe of the land itſelf; wherefore the bill was diſmiſſed as to this point.

(*b*) *B.* by settlement, created a term of 1000 years upon trust, that if it should happen that he should have no son but two daughters living at his death, the trustees should raise and pay out of the rents and profits of the estate to the younger daughter 5000l. *if she married with the consent of her mother, if living, and continuing his widow; if not, then with the consent of the trustees or the survivor of them, his executors, administrators or assigns,* and should pay to such daughter the yearly sum of 100l for maintenance until her marriage with such consent. But if he should have a son, and two or more daughters, then the trustees were to raise and pay to each daughter 2000l. *if she married with such consent as aforesaid,* and, until such marriage, should pay each daughter the annual sum of 50l. till eighteen, and afterwards 70l. for her maintenance so long as Lady *Aston* should live, and from and after her death, should pay to each daughter the yearly sum of 100l. till their marriage. And in case any of the daughters died before the portion was paid, it should not go to her executor, but the estate should be exonerated of it, or if raised, it should go to the person on whom the reversion of the premises was limited to descend, with a proviso that the term should cease if there were no son or daughter, or in case of the death of all the younger sons, and of all the daughters without marriage. Afterwards *B.* by his will, taking notice of the settlement, directed, that out of his personal estate there should be paid to each of his daughters the further sum of 2000l. *in augmentation of their portions, subject to the same conditions, provisoes and limitations, as their original portions,* and in case any of his daughters died before the original portions became payable, then the legacy of 2000l. was not to be paid to her executor, but that his lady and executrix should have the *residuum* of this money, if any, and made her residuary legatee and guardian of his children. *B.* died, leaving eight daughters, two of whom married against the injunctions and consent of their mother. A suit being instituted by one of the two married daughters and her husband, and by the other who had become a widow, to have the will proved and the trusts performed, the *Master of the Rolls* declared that the plaintiffs were intitled to their original and additional fortunes, and an order was made to that effect. To discharge which order, an application having been made to the *Chancellor*, he took to his assistance Lord Chief Justices *Lee* and *Willes*, and *Comyns*, J. And as the last judge delivered his sentiments more at large than the rest, in which are contained every thing advanced by the whole court on the subject; I shall only state what is reported to have been said by his Lord-

(*b*) Harvey *v.* Aston, 1 Atk. 361.

ſhip. *Comyns*, J. " I think it very clear that it was the intention of *B.* that his daughters ſhould not have their original portions if they married without ſuch conſent as preſcribed, and this intent appears upon every clauſe in the deed. It is agreed that the portions were not payable till marriage, and there is no direction in the deed, that they ſhall be payable at marriage only, but expreſsly on marriage *with conſent*. It is a known rule that where any act is previous to any eſtate or truſt, and that act conſiſts of ſeveral particulars, every particular muſt be performed before the eſtate or truſt can veſt or take effect, and to this purpoſe there are many caſes, but it may be ſufficient to cite one only, and that is Sir *Cæſar Wood* v. the Duke of *Southampton*, Show. P. C. 83—87. which comes up to this point as to the performance of both parts. But *the objection* which has been moſt relied on at the bar was, that in the civil law theſe reſtrictions are looked upon as unlawful, and that the doctrine of the civil law has been adopted into this court. I think ſome regard is to be had to the civil law, and what *Selden* lays down in his diſſertation upon *Fleta*, lib. 3. ch. 5. ſeems to direct how far it ſhall be admitted. It will therefore be proper to take ſome notice of the ground of this maxim in the civil law, that conditions of marriage with conſent, annexed to legacies, are void conditions. It was the rule of that law, that nobody ſhould deviſe their eſtate without leaving ſomething to the heir; ſo alſo by the ſtatute of the 32 Hen. 8, there is a particular ſaving of one third part not deviſable. The proviſion of the *lex Falcidia* was, *ita detur legatum ne minus quàm partem quartam hæreditatis eo teſtamento hæredes capiant.* And it was called *legitima portio*. This law was endeavoured to be evaded two ways; firſt, upon leaving the whole to the heir, upon condition of marrying with the conſent of ſuch perſon who it was known would never conſent; ſecondly, where the parties were in the power of the teſtator, by forcing them to marry ſuch perſons only as they could not marry with honeſty and credit, ſo that this was looked upon as an evaſion of the law; but the law always was, that where the condition *was not a total reſtraint*, as where a particular perſon only is excepted, then the condition was good. But as it has been inſiſted, that this court has adopted this rule, I ſhall mention the caſes on that head. I take it to be now ſettled, that if a pecuniary legacy be given on condition of marriage with conſent, and there is no deviſe over, that ſuch condition is void, *Bellaſis* v. *Ermine*, 1 Ch. Ca. 22—58. *Fleming* v. *Walgrave*, and *Garret* v. *Pritty*. But none of theſe caſes come up to the preſent, which is the caſe of a *portion charged on land*.—*King* v. *Withers*, 1 Eq. Ca. Abr. 112. was alſo cited, but there the teſtator appointed two periods of time to intitle the daughter to her portion; marriage,

or the age of twenty-one; and as she had attained the age of twenty-one, it became a vested interest. So where the condition has been performed to a reasonable intent, the court has dispensed with the want of circumstances, as where the major part of the trustees consent, or where the trustees give an implied, not an express consent, so where the father has made the marriage himself. *Gresly* v. *Luther*, in *Moore* 857. seems to have been determined in the ecclesiastical court, neither does it appear that there was any devise over. The chief reason on which the court went in the determination of *Fleming* v. *Walgrave*, seems to be that a distinction was taken (as is said in 2 Vern. 573, *Creagh* v. *Wilson*), between a condition that she shall not marry *without* consent, and a condition that she shall not marry *against* consent, or contrary to their liking. The case of *Needham* v. *Vernon*, in Lord *Nottingham*'s time, Eq. Ca. Abr. 111. seems to have been determined by consent; and though it was said in that case, that all conditions in restraint of marriage are void by the civil law, and that this court considers them *in terrorem* only, yet this is rather taken *pro confesso*, than any express determination on that point. That they are not so by the common law, is evident from the case of *Fry* v. *Porter*, 1 Mod. 300. The reason the court went upon in *Semphill* v. *Bailey*, Pre. Ch. 562, was, that the condition was looked upon as a loose inconsiderate expression, and intended to be by way of caution only, for there was no devise over. None of these cases, however, come up to the present. Pecuniary legacies being suable in the spiritual court, is the reason why that law in some respects governs as to them. But it is undoubtedly true, that this court has not universally followed the maxim of the civil law, even upon this point, for it has been always agreed, that where there is a devise over, it shall take effect. It is said in this case, there is no particular devise over to any particular person, but I think it is equally strong, for it is declared that the estate shall be exonerated, or if the money be raised, it shall be paid to the person who is intitled to the reversion. It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest until that condition be performed, and this has been so strongly adhered to, that even where the condition is become impossible, no estate or interest shall grow thereon. But it is said, the civil law has no such distinction as that of conditions precedent. It is true they have no such term, but they have the thing in effect. *Conditio* (they say) *suspendit legatum*, and saith *Ulpian legata sub conditione relicta non statim, sed cum conditione extitirit, deberi incipiunt; ideoque interim delegari non poterunt.* Dig. Lib. 35. tit. 1. De condition. et Demonstrat. lex 41. They distinguish between three sorts of legacies; First, a pure legacy.

—Secondly, one payable at a day future, but certain.—Thirdly, one payable on a condition that is uncertain in its event. As to the firſt, they ſay, *dies legati venit*. As to the ſecond, *dies cedit, ſed non venit*. As to the third, *dies nec cedit nec venit*; and in the laſt caſe, if the legatee die before the contingency happens, it ſhall not go to his executor. As to the legacies under the will, the caſe is more doubtful, for there is no expreſs deviſe over at all, but to the perſon intitled to the *reſiduum*, and it is ſaid in *Garret* v. *Pritty* (*i*), that the daughter ſhall have the whole 3000l. though ſhe married without conſent, becauſe it is not deviſed over, but only to fall into the ſurplus. But the caſe of *Ames* v. *Horner* (*k*), is a later caſe, and it is there held that the deviſe of the ſurplus of the perſonal eſtate is a deviſe over. It would be a contradiction in this court to ſay they are not intitled to the firſt, and yet to the ſecond, which are to be paid together with, and at the time of the original portions, and are made ſubject to all the ſame conditions, limitations and proviſoes; and it would be likewiſe contradicting, even the courſe of the civil law, for by that, if a legacy is payable on a contingency, and the party dies before the contingency happens, it lapſes." With this opinion the Chancellor and the other Judges coincided, and the order of the *Maſter of the Rolls* was diſcharged.

In deeds, &c. which are preſumed to be made and entered into with all due care and circumſpection, the law has ordained certain appropriate words to create conditions, without which it will not conſider a condition as properly made; but in wills, other words are ſufficient for the purpoſe, by reaſon of the indulgence the ſame law allows to that imbecility of body and mind with which it conſiders teſtators afflicted at the time thoſe inſtruments are made; in all caſes, therefore, where the intention can be collected, that the bequeſt was meant to be conditional, that intent, if legal, will be effectuated by whatever words expreſſed (*l*).

(*i*) *Supra*. (*k*) See obſervations, *ſupra*. p. 326. (*l*) Swinb. pt. 4. ſ. 5. p. 236. Co. Litt. 204. a. Fulbeck's Paralele, 62. Touchſt. 451.

SECT. II.—*Of the Performance of Conditions.*

The civil law has required a ſtrict performance of conditions in general caſes; thus if 100l. were given to *B.* if he paid *C.* 50l. within a certain period, and *C.* died before that time, payment to *C.*'s executors upon the day would not be ſufficient (*a*); it ſeems, however, that the *common* law would not require ſuch a literal performance of the condition, but permit the execution of it *cy pres*, viz. by allowing payment of the 50l. to *C.*'s executors, to be a good performance (*b*). Upon a ſimilar principle with that of *cy pres* performance, the *civil* law has admitted a very extenſive exception to its general doctrine, *viz.* in all caſes where it is apparent, that teſtators paid more reſpect to the end or execution of the condition, than to the *mean* preſcribed for the performance (*c*). Therefore if *A.* bequeathed a legacy to *B.* in caſe he erected a monument for *A.* *within three days* after *A.*'s death: although *B.* ſhould not *literally* comply with the condition, yet he would be intitled to his legacy upon the performance of it, within a reaſonable time, as the erection of the monument would be conſidered as of the ſubſtance of the legacy, and the time appointed for building it, but a mean to expedite the erection (*d*). We muſt obſerve, however, that the time appointed for performance of conditions, is frequently *material*, and muſt not be exceeded without the concurrence of the perſon to whom the condition is to be performed (*e*). But if the perſon, in whoſe favour the condition was made, conſent to accept the performance in a way different from that preſcribed, he will not be permitted to take advantage of the literal non-execution, for it was his own fault to agree to a different performance, and it is a maxim, that *Volenti non fit Injuria* (*f*.)

When no place is appointed for performance of the condition, when the condition relates to money or other perſonal or tranſitory thing, the perſon to execute it muſt find out the perſon, to whom it is to be performed, ſay *B.* if he be *infra regnum Angliæ*; but if *B.* be abroad, the condition will be ſaved, although no tender or payment of the money be made to him (*g*); and although the place be named, yet if the legatee have

(*a*) Swinb. part 4. ſect. 7. page 245. (*b*) Co. Litt. 205. b. (*c*) Swinb. eadem pars, ſect. & page. (*d*) Swinb. part 4, ſect. 6, page 242. (*e*) Litt. ſect 337. (*f*) Co. Litt. 212. b. Swinb. part 4, ſect. 7, page 245. (*g*) Co. Litt. 210 b.

the whole period of his life to perform it, he must give notice to the person to whom the condition is to be performed, of the time when he intends to execute it, otherwise such person would be under the necessity of attending always at the place appointed, in expectancy, which would be unreasonable (*h*).

There are certain species of conditions which may be considered performed even in the life of the persons imposing them; but they are such, as from their nature do not admit of repetition, and the performance whereof testators are presumed to have been ignorant, at the time they made their testaments (*i*). Thus if a legacy were given to *B.* if he remit a debt due to him from *C.* which debt had been already remitted by *B.*; such remittal, although before the date of the testament, would be considered a performance of the condition. And again, if a legacy were given to *B.* if the testator's ship return from Venice, which vessel was then returned, the bequest would be good.

A legatee may be said to have time during life to perform a condition, when no period is fixed for the purpose; as if the bequest were made to *A.* if he pay to the poor of *B.* 10l. and the like (*k*). Thus,

(*l*) *A.* after several pecuniary legacies, bequeathed to trustees 4000l. for the use of *Jane Wood*, if she should marry with consent of the trustees, if not, then only 1000l.; also to the same trustees 4000l. for the use of *Martha Wood*, if she should marry with their consent, if not, only 1000l.—then there was this clause, "if either of these girls should marry into the families of *Gosling* or *Rivington*, and have a son, I give all my estate to him for life, (with remainders over;) if they should not marry, then I give the 8000l. and all my estate to —— *Randal* (the plaintiff,) for life, and, if he has a son, then to that son for ever, but not to come to him till 24; if he has no son, then to *Francis Gosling*." Upon a bill filed there was a decree, that the money should be invested in the funds till the event happened, and for leave to the parties interested to apply as occasions should arise. The *Woods* married with consent, but not into the families of *Rivington* or *Gosling*, upon which the present plaintiff filed his bill for the residue as being forfeited to him. And by Lord *Thurlow*, C. "Till they married nothing could vest, for marriage was a condition precedent: then could any thing vest till the whole contingency became impossible? That suspends it during their lives.—You suppose if they once married, they had lost all chance of marrying a *Rivington* or a *Gosling*; if he had said so, it

(*h*) Co. Litt. 211. a. (*i*) Swinb. part 4, sect. 14, page 275. (*k*) Swinb. eadem pars & sect. (*l*) Randal *v.* Payne, 1 Bro. CC. 55.

would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the court would not incline to refuse him. The decree that the money should be invested, &c. must be carried into execution."

When legacies are given to trustees and executors in recompense of the trouble attending the execution of the trusts of the will, such legacies are *conditional*, and the legatees must shew by some unequivocal act an intention to accept the trusts and comply with the terms of the gift, in order to intitle themselves to the legacies;—Accordingly,—

(*m*) *A.* bequeathed to her executors and trustees 100*l.* each for their care and loss of time in the execution of the trusts reposed in them, together with all reasonable expences when they should be called from home on account thereof; and she appointed *J. Ford*, *T. Rowley*, and *J. Wilson*, trustees and joint executors of her will. *B.* the sister of *A.* also by her will of the same date gave to her executors and trustees, legacies of 100*l.* each, together with their reasonable expences, exactly according to the will of her sister, and appointed the same three persons executors and trustees. *J. Ford*, one of the executors and trustees, survived the testatrixes so short a time, that he was unable to concur with his co-executors in proving the wills, but it appeared that his co-executors went to his house, he being unwell, and there settled the orders given respecting the funeral of the testatrix *A.* and that he acted in the trusts of the wills, in directing payment of the burial-fees, of the expences of making the coffins, and opening the vault. Under these circumstances, the executors of *Ford*, the plaintiffs, claimed the legacies of 100*l.* under each will, and the question was, whether they were intitled? And by the *Master of the Rolls*, "The only question is, whether this executor has demonstrably shewn his intention to act in the execution of the trust, for which he with two other persons was to receive these legacies. It is most clear they were not given to him as a mark of personal regard merely, but as a reward for taking upon him the execution of the trusts. First, is there any evidence that he understood and knew he had such a trust imposed upon him, and the terms upon which it was to be taken? I will not determine that if he had died at a distance without knowing that he was appointed executor, or manifesting any intention to take upon him the trust, as if he had died at a distance, before the information reached him, he would be intitled. I will not decide that one way or other, but that is not the case here. This executor certainly did not die without

(*m*) Harrison *v.* Rowley, 4 Ves. Jun. CC. 212.

knowing of this truſt: on the contrary the two other executors, the defendants, went to him, and conſulted with him reſpecting the funeral of the ſurvivor of theſe two ladies at leaſt; (it does not appear by whoſe directions the other was buried) and he concurred in giving the directions. Is not that an act notifying his intention to accept the truſt? I muſt ſuppoſe they informed him of the will, the truſt impoſed upon them, and the reward. With this knowledge he concurred in thoſe directions. It is true, I admit, that if there was no executor, giving directions for the funeral is only an act of charity, and will not make a man executor. God forbid it ſhould; for then the deceaſed could not be buried by any one from the apprehenſion of being involved as executor, but this perſon did not concur in the directions for the funeral as an act of charity. There were two other executors, the deceaſed would have been buried, whether he concurred or not. He alſo concurred in paying certain ſums for the burial-fees, for making the coffins, and opening the vault, the conſequences of thoſe directions. Then, is there any lacheſs in not proving the will? As to the two caſes cited (*n*), nothing is ſo clear, as that if a legacy be given to a man as executor, whether expreſſed to be for care and pains or not, he muſt, in order to intitle himſelf to the legacy, clothe himſelf with the character of executor. If there be any circumſtance to ſhew he was backward in undertaking the truſt repoſed in him he ſhall not have it. But this executor did as much as the defendants, for they did not prove the will for a conſiderable time. He did as much as any man could do in ſhewing demonſtrably he meant to undertake the truſt. His dying before he executed it, cannot poſſibly defeat him. Therefore upon the evidence and the rules that have been laid down, I am of opinion, he has acted as far as he could, and was intitled."

It appears from the caſe laſt ſtated, and thoſe next mentioned, that if truſtees or executors refuſe to interfere in the buſineſs of the truſts, or to prove the will, they will not be intitled to the legacies given to them, in the character of truſtees and executors. Accordingly,—

(*o*) *A.* bequeathed legacies to certain perſons, by the deſcription of "his very good friends," and in the further part of the will, deſired them "to act as executors." *Smith*, one of thoſe perſons, by his anſwer, ſaid, that he had not proved the will, nor acted as executor, and yet claimed the legacy: but the *Maſter of the Rolls* ſaid, that an executor ſo appointed could not claim his legacy without acting, or at leaſt, without proving the will.

(*n*) Read *v.* Devaynes, and Abbot *v.* Maſſie, *infrà*. (*o*) Read *v.* Devaynes, 3 Bro. CC. 95.

(*p*) *B.* bequeathed to *J. Maſſie* and *W. G.* 50l. as executors: *W. G.* refuſed to act as executor but claimed the legacy. And by the *Lord Chancellor*, "As to the 50l. it is impoſſible that can be allowed, becauſe it is given to him as executor, and he did not prove the will."

A condition ſometimes conſiſts of a variety of parts which are either *copulative* or *disjunctive*: the *former* muſt be executed in all reſpects, or elſe the condition will not be performed, except ſome of the component members be impoſſible, or afterwards become ſo, and then the law will divide them, as if *A.* bequeath to *B.* 100l. upon condition that he *and* his executors diſpoſe of certain goods: as *B.* can have no executors during life, the condition will be conſidered disjunctive (*q*); but performance of any part of the *latter* will in general be ſufficient to prevent a breach of the condition. If the condition be disjunctive, and it appears to have been the intention that the perſon ſhould have an election to perform either branch of it, but afterwards one them becomes impoſſible *by the act of God*, it ſeems that ſuch event would excuſe the party from performing the other part of the condition, upon the principle that the election originally given to him being defeated by the interpoſition of providence, a contrary conſtruction would militate againſt the intention and the well known maxim that *actus dei nemini facit injuriam* (*r*). Such appears to be the rule of law; but in inſtances where no diſadvantage can accrue to any of the parties, courts of equity have extended the right of election to executors, when the perſon to elect has died within the period appointed for the purpoſe; Thus,—

(*s*) *A.* upon his marriage with his wife, gave a bond to her truſtee, in the penalty of 4000l. conditioned that if he at any time *within four months*, ſhould ſettle and aſſure freehold lands of the yearly value of 100l. on his wife for life, or if his heirs, executors or adminiſtrators ſhould within the ſpace of four months after his death pay unto her 2000l. then the bond to be void. The huſband died within four months without making any ſuch ſettlement upon his wife as required by the bond, therefore the widow claimed the 2000l. out of his aſſets; but on the other hand it was contended that as the huſband died within the four months, the election which he had by the bond devolved upon his heirs, executors or adminiſtrators. And the *Maſter of the Rolls* ſaid, "As to the objection, that the heirs or the executors of the teſtator ought

(*p*) Abbot *v.* Maſſie, 3 Veſ. Jun. CC. 148. (*q*) Roll. Ab. 444, 450. (*r*) Ibid. 450. pl. 11. Co. Litt. 225. a. Cro. Eliz. 398. 2 Mod. 200. (*s*) Eaſtwood *v.* Vinke, 2 P. Will. 613.

to have their election either to ſettle lands or pay the money; the huſband, it is true, had this election in him, which was to continue four months after the marriage, but he dying within the four months, though the time expired afterwards, yet where, upon the death of the teſtator, matters are for ſome time in confuſion, nothing is more uſual than for the court to enlarge the time, or to relieve againſt any lapſe thereof; wherefore let the huſband's executors pay the incurring profits of the 100l. *per annum*, from the death of the huſband, to the wife, and ſettle upon her the 100l. *per annum*, they not being bound to pay the 2000l. to her."

It is a rule in equity to relieve againſt forfeitures occaſioned by the non-performance of conditions, precedent or ſubſequent, which lie *in compenſation*, ſo that the non-compliance with time, place, &c. will not be allowed to create a forfeiture, in caſes that admit of recompence *(t)*.

(u) *A.* in his lifetime, granted to his ſon *Paris*, two annuities of 100l. and 200l. and there being ſubſiſting accounts between them reſpecting different commiſſary-ſhips in *Germany*, where *Paris* was deputy-paymaſter to *A.* *A.* by his will gave to *Paris* 600l. a-year upon condition that he ſhould *within three months* execute a releaſe of all demands on his eſtates, being aſſured there was nothing due to him on the accounts;—*C.* and *F. Taylor*, other children of the teſtator, who were beneficially intereſted under his will, filed a bill againſt *Paris*, (who claimed 23,317l. as due to him from the teſtator's eſtate) that he might be compelled to releaſe, ſtating that a releaſe had been tendered and refuſed, and therefore inſiſting, that he ſhould be conſidered as having broken the condition upon which he was to have the annuity of 600l. *Paris* alſo filed his bill, inſiſting on his demands upon his father's eſtate, and that he might releaſe when he would, having an option either to do ſo or not, upon the cloſe of the accounts: And Lord *Thurlow*, C. "I am of opinion, it was the true meaning of the teſtator, to prevent the account *Paris* ſought by his bill, and therefore I cannot order ſuch account, or furniſh him by means of this court, with any intelligence of his father's affairs. This therefore excludes every idea of the teſtator, that he ſhould have an election. The next queſtion is, whether the bill ſo filed, has forfeited the 600l. a year, and that leads to a common rule of the court as to conditions precedent. If the court can put the parties in the ſame ſituation as if the condition had been performed, it will never ſuffer a forfeiture to attach. The releaſe tendered

(t) Kaim's Princ. of Eq. 51—81. Ed. 1760. *(u)* Taylor *v.* Popham, 1 Bro. CC. 168.

went to the 100l. and 200l. granted before, (*that Paris* had a right to refuſe) or any other claims under the will: I think his litigating it, did not forfeit the 600l. annuity. In order to do juſtice, I muſt do no more than declare the will duly proved, and refer it to the maſter to prepare a proper releaſe, declaring the intent to be to prevent a conteſt, but that the will did not bar the annuities granted in the lifetime, or any claims of *Paris*, except as to the mutual dealings and tranſactions in the negociation of money." Upon further directions it was declared, that *Paris* having refuſed to execute the releaſe tendered to him, as ſettled by the maſter, was not intitled to the annuity of 600l. and an account was ordered to be taken of all dealings and tranſactions between him and the teſtator.

We have juſt ſeen that Lord *Thurlow* lays down the extent of the rule of the court's interference, to caſes where the parties can be put in the ſame ſituation by compenſation or otherwiſe, as if the conditions had been actually performed; if, therefore, from the nature of the condition, this cannot be effected, equity will not relieve againſt a breach of it: thus conditions requiring marriage with conſent, being in their nature incapable of any compenſation when broken, the court has never given relief againſt a breach of them. In thoſe caſes, however, where the conditions laſt alluded to, are *ſubſequent*, and afterwards become impoſſible to be literally performed, as by the death of all or one of the perſons whoſe conſent is required, although there be a limitation over of the legacies upon a breach of ſuch conditions, yet the non-performance of them will not create a forfeiture, conditions which diveſt eſtates or intereſts being always conſtrued ſtrictly. Accordingly,—

(*x*) *A.* bequeathed the reſidue of his perſonal eſtate to *Jane Styles*, provided ſhe married with the conſent of *C.* and *D.* his executors: but if ſhe married without ſuch conſent, he then gave his reſiduary eſtate to *E.* One of the executors died, and afterwards the legatee married without the conſent of the ſurviving executor: and upon a bill filed by *E.* for the reſidue of the teſtator's effects, the queſtion was whether *Jane Styles* had not forfeited the bequeſt to her by marrying without ſuch conſent as above? But by the *Maſter of the Rolls*, "It is very clear that the plaintiff, the deviſee over has no title to the *reſiduum*: firſt in the nature of the thing, and according to the intention of the teſtator, this could not be a condition precedent for at that rate, the right to the *reſiduum* might not have veſted in any perſon whatever for 20 or 30 years after

(*x*) Peyton *v.* Bury, 2 P. Will. 626. See Lord *Thurlow*'s obſervations upon this caſe, in Jones *v.* Suffolk, *infrà*.

the teſtator's death, ſince both the executors might have lived, and *Jane Styles* continued ſo long unmarried, during all which time the right to the *reſiduum* could not be ſaid to be in the executors, they being expreſsly mentioned to be executors in truſt: beſides the bequeſt of the *reſiduum* is firſt to *Jane*, which if the will had ſtopped there, would have been an abſolute deviſe, ſo that the following condition annexed muſt be a ſubſequent, not a preceding one. Now the rule of law is, that if there be a ſubſequent condition, which becomes impoſſible by the act of God, this excuſes and diſcharges the grantee from the condition; *lex non cogit ad impoſſibilia*, which conſtruction ought the rather to prevail, with regard to a condition ſo odious as that in the preſent caſe, which reſtrains the freedom of marriage, and is void by the civil law, when annexed to a perſonal legacy. The plaintiff by his bill comes to eſtabliſh a forfeiture, and would have the court add theſe words to the will, which the teſtator might, but did not think fit to inſiſt upon, that *Jane Styles* ſhould not marry without the conſent of the executors, *or of the ſurvivor of them*, and which the teſtator might omit upon good reaſon, as intending that both the executors ſhould confer together about the marriage of *Jane Styles*, in order that the one by arguments might convince the other, touching the ſuitableneſs of a match, which cannot now be done when one only is left. Moreover this conſent directed to be had being like a bare authority, and ſo different from that which is coupled with an intereſt, could not ſurvive without expreſs words for that purpoſe." His Honor therefore diſmiſſed the bill with coſts.

(*y*) *B.* bequeathed 1000l. to his only daughter, *Mary Graydon*, to be paid at 21, or upon the day of marriage which ſhould firſt happen, provided ſhe married with the conſent of his executors, but if ſhe died before the money became payable on the conditions aforeſaid, he gave the 1000l. equally between his two youngeſt ſons *B.* and *G. Graydon*, and appointed *C. D.* and *E.* executors. *Mary* married after all the executors were dead, and without conſent, ſo that the queſtion was, whether ſhe had not forfeited the legacy by her marriage? And Lord *Hardwicke*, C. " As to the legacy of 1000l. here is certainly a diſpoſition over in caſe of a forfeiture, ſo that it ſtands diſtinct from thoſe caſes where there is no deviſe over. Where the condition is become impoſſible by the perſon dying, whoſe conſent was neceſſary before the marriage, it is an excuſe. I am likewiſe of opinion that this is only a condition ſubſequent to diveſt the legacy in caſe of a marriage before 21, and it is the conſtant rule of law, in the caſe of conditions ſubſe-

(*y*) Graydon *v.* Graydon, 2 Atk. 16.

quent, that if the performance becomes impoſſible, by the act of God, that it is abſolutely void, for in Co. Litt. 206. a. it is laid down, that in caſe of a feofment in fee, with a condition ſubſequent that is impoſſible, the eſtate of the feofee is abſolute; and therefore the daughter, according to this rule is intitled to the 1000l. under the father's-will."

(z) *C.* having bequeathed his houſehold goods, &c. to his wife, gave all his other eſtates to her during widowhood, in truſt to pay his debts and educate his children till each ſhould be married; and after the death or marriage of his wife, he directed all his real and perſonal eſtate to be paid and applied to the equal uſe of all his children who ſhould be then living: and in caſe his wife ſhould marry again, ſhe ſhould from that time have no further to do with his children, or any of his effects, &c. but the children ſhould be under the care of guardians to be choſen and appointed as ſoon as poſſible upon that occaſion, and truſtees ſhould be appointed for his effects for the benefit of his children till they attained 21, and in caſe any of them died before that age, then his or her ſhare ſhould be equally divided among the ſurvivors; and in caſe *any of his daughters ſhould marry without the conſent of her mother, and in default of her mother, her guardians firſt had and obtained, then her ſhare to be equally divided among the unmarried ones*; and if they ſhould all die before 21, then his eſtates, &c. to be ſubject to the will of his wife, provided ſhe be unmarried at the time of his death, and he appointed his wife and *W. S.* her father, joint executors of his will, and guardians of his children. *Mary* one of the daughters married without conſent; and the queſtion was, whether ſhe had forfeited her intereſt under the will? And by Lord *Thurlow*, C. "This is a caſe of difficulty—It is a condition ſubſequent to defeat an intereſt veſted, and therefore to be conſtrued with all ſtrictneſs. The words are, *without conſent of guardians*, in the plural number. The will has appointed two guardians; it has given a ſpecial authority, to be exerciſed only by the wife while both are alive; and in default of the wife only, the authority is to be exerciſed by *guardians*. The caſe cited of *Peyton* v. *Bury* (a) goes a great way. The *name* of guardian as the *name* of executor, ſurvives, but *the authority in queſtion is collateral to the office of guardian*. That caſe while it ſtands is of weight: but I ſhould have much heſitation to decide upon it. Suppoſe a power was given to guardians to let an eſtate for 21 years, a ſpecial authority, and one ſhould die, I am apprehenſive the court would not with alacrity determine that the ſurviving guardian had not a power to let

(z) Jones v. the Earl of Suffolk, 1 Bro. CC. 528. (a) *Supra.*

When it was ſaid, that conditions to defeat an eſtate are odious, I feel it, but it is a diſagreeable argument to guide a deciſion. What one perſon may think odious, another may judge of differently: the deciſion muſt depend on the feelings of the judge; I ſhould therefore be ſorry to go upon the odiouſneſs of the condition. The poſition of the will is nonſenſe. The clauſe appointing guardians is ſubſequent to the whole of the proviſions in queſtion: the proviſions are ſubſequent to a clauſe directing the appointment of guardians upon default of the wife. If one daughter had died before the marriage of the other, the clauſe could have no effect: If the unmarried daughter ſhould now marry more imprudently, the claim could have no effect. This could not have been the intention of the teſtator. Arguments from a ſuppoſition of what a teſtator would have done, if he had been aware of all circumſtances, are not very good grounds for giving a conſtruction: but they may be fairly uſed to aſſiſt a *dubious floating conſtruction*. Upon the whole the intention of the teſtator, throughout his will, is very imperfectly and inadequately expreſſed. It is clear we have not his *whole* intention. I am very doubtful whether the word *guardians* muſt not refer to other perſons, than the guardians appointed by the will. It ſeems abſurd to ſuppoſe, that he meant to truſt upon the death of his wife, unmarried, the perſon whom he did not mean to truſt in caſe of her marriage. In conſcience I believe that the circumſtance was not in his contemplation at the time he wrote the will." His Lordſhip at firſt directed an account to be taken, without any declaration of the rights of the parties, ſaying he would further conſider the point; but after ſome heſitation he declared his opinion that *Mary* was intitled notwithſtanding her marriage, and decreed accordingly.

In ſome inſtances the executor whoſe aſſent is required, may renounce the executorſhip, and adminiſtration may be granted to another perſon: it may be aſked, will a marriage without conſent under thoſe circumſtances be a forfeiture of the legacy? Lord *Hardwicke* has decided in the affirmative, Thus;—

(*b*) *A.* bequeathed to her daughter *Mary Graydon*, all her wearing apparel, &c. with all her dreſſing plate, &c. and declared her will to be that in caſe her daughter married before 21, without the conſent and the approbation of her executor, under his hand, (if living), that then ſhe ſhould not be intitled to any part of ſuch legacies as ſhe had therein left her, but that the whole ſhare ſhould be equally divided between her, the teſtatrix's ſons *B.* and *G. Graydon*; and the reſidue after

(*b*) Graydon *v.* Graydon, 2 Atk. 16—19.

debts and legacies paid, ſhe gave to her three children *Mary* and *B.* and *G. Graydon*, and appointed *J. Graydon* ſole executor. *J. Graydon* the executor, who was to have given his conſent to *Mary*'s marriage, renounced the executorſhip in the moſt formal manner in the eccleſiaſtical court, and *A. Timewell* took out adminiſtration with the will annexed to the teſtatrix. *Mary* having married under 21 without conſent, the queſtion was, whether ſhe was intitled to the legacies under her mother's will? And Lord *Hardwicke*, C. "Two queſtions ariſe under the will of the mother, firſt with regard to the ſpecific legacy to the daughter, and ſecondly with regard to the ſurplus. I am of opinion that the latter clauſe goes to the whole, and that the words, 'ſhe ſhall not then be intitled to any part of ſuch legacies as I have herein left her,' being ſpoken at the ſame time, is no more a relation to what goes before than to what follows, but is equally applicable to both. But it has been objected, that this is not ſuch a marriage as is a breach of the condition, becauſe *J. Graydon*, the executor, has renounced and never took out adminiſtration, and therefore it has been granted only with the will annexed to Mr. *Timewell*. Now I am of opinion the objection is not well grounded, for this is a deſcripton of every perſon who ſhall be adminiſtrator, and that this was a power not annexed to the office of executor, but independent from the reſt of his duty as executor; therefore upon the whole of this part of the caſe, I declare that this marriage is a forfeiture of the portion given under the will of the mother."

Upon the principle that courts of equity look upon conditions in reſtraint of marriage in an unfavourable view, they have not been ſtrict in requiring ſuch conditions precedent or ſubſequent, to be complied with in every particular, for if the conſent be given in ſubſtance it will be ſufficient;—to this effect *Comyns*, J. expreſſed himſelf in *Harvey* v. *Aſton* (*c*), viz. that where the condition was performed to a reaſonable intent, the court had diſpenſed with the want of circumſtances, as when the major part of the truſtees conſented, or when an implied aſſent was given, &c.

(*d*) *A.* bequeathed to the plaintiff *Maria* 300l. a pearl necklace and jewels, but if ſhe married under 21, without the conſent of the executors or the major part of them, then what ſhe gave to *Maria* ſhould go to the children of the teſtatrix's ſiſter, the wife of the defendant *Meſgrett*, and ſhe appointed *Meſgrett* and two other perſons executors. *Maria* being eleven years old at her mother's death, lived ſome time afterwards with *C.* one of the executors, and was there courted by

(*c*) *Supra*. (*d*) Meſgrett *v.* Meſgrett, 2 Vern. 580.

the other plaintiff her husband, the son of *Mesgrett*, by a former wife; and afterwards *Maria* removed to the house of the executor *Mesgrett*, where the marriage was had with his privity, although he now insisted that the legacy was forfeited, and given over to his children by his *second* wife: the other executors admitted in their answer that they had notice of the courtship, and did not contradict or disapprove of it, nor remove the young woman as they might have done. Under these circumstances the Lord *Keeper* decreed for the plaintiffs, as it plainly appeared there was at least a *tacit* consent, the will not prescribing the manner of the consent to be in writing or otherwise: and he looked upon it as a fraud in *Mesgrett*, to promote the marriage and then to pretend a forfeiture for want of a consent, to procure the legacy for his children by his last wife.

(*e*) *B.* having two daughters, the Countess of *Clanrickard* and Lady *Desbouverie*; in 1714, settled a house in *Ormond-Street*, and some leasehold estates in trust for Lady *C.* for life, and to such person as she by writing should appoint. *B.* by his will in 1718, gave a legacy to the plaintiff *Ann*, (eldest daughter of Lady *C.*) of 1000l. at 21 or marriage, with interest at 4-per cent.—To *John* her brother 1000l. at 21, and if either died, the whole to the survivor. He gave the residue of his real and personal estate to the trustees, in trust as to one moiety for the sole and separate use of Lady *C.* and by a codicil he directed, that in case the plaintiff *Ann* should marry in the life of the Countess without her consent, that the plaintiff's legacy should be divided among the rest of Lady *C.*'s children. Mr. *De Golls* was the surviving trustee: the testator and the Earl of *Clanrickard* died. In 1732, Lady *C.* made an appointment of her house and the leasehold estates to *Smith*, Earl of *Clanrickard* for life, and to his first and other sons in tail male, to daughters in tail general, remainder, as to one moiety of the freehold, to the plaintiff *Ann* for life, and to her sons and daughters in tail male, remainder to Lady *M. Burke*; as to the other moiety in the same manner with cross remainders; and by another deed poll of the same date, appointed Mr. *De Golls*, to assign the real and personal estate devised by her father to the same trustees Sir *E. Desbouverie*, *J. Manley* and *T. Ward*, in trust to sell and lay out in lands, and settle to the same uses as the freehold by the last deed, and till so invested, to be placed out at interest, and be applied for the benefit of the persons intitled to the rents and profits of the estate. In both deeds was the following proviso: that if her son the Earl of *C.*, the

(*e*) Daley *v.* Sir Edward Desbouverie, 2 Atk. 261. Also 3 Ves. 535—S. P.

the plaintiff *Ann*, and Lady *M. Burke*, ſhould marry without the conſent of the truſtees, or the major part of them, or the ſurvivor of them, if any of them ſhould be then living, that then he, ſhe, or they, marrying without ſuch conſent, and his or their iſſue or deſcendants ſhould forfeit their right to the premiſes, and the next perſon in remainder, purſuant to the appointment aforeſaid, ſhould in ſuch caſe enter and enjoy the ſame, as if he, ſhe or they ſo marrying without conſent was or were actually dead without iſſue. By her will ſhe confirmed the deeds poll, and made Sir *E. Deſbouverie*, *J. Manley* and *T. Ward*, executors and reſiduary legatees on the ſame uſes, and alſo guardians to her children. Upon the death of the Counteſs, Mr. *De Golls*, in 1734, purſuant to a decree in Chancery, aſſigned all the truſt-eſtates to Sir *E. Deſbouverie*. In 1734, a treaty of marriage was propoſed between the plaintiffs, and after it had been continued about five months the plaintiff *Daley* acquainted Sir *E. Deſbouverie* with his intentions, upon which Sir *E.* took down in writing from *Daley*'s mouth the following propoſal for a ſettlement upon the marriage: 4000 acres of land in *Ireland*, worth 1200l. *per annum*, of which 600l. *per annum* were propoſed to be ſettled in preſent for their maintenance: the remaining 600l. *per annum* in reverſion after the father's death; in caſe ſhe is a widow and has iſſue, 500l. *per annum*, if no iſſue 600l. *per annum* jointure, her own fortune to be ſettled together with the 1200l. *per annum*. Sir *E. Deſbouverie* communicated the propoſal to *Manley* and *Ward* the next day, who did not approve of it, in regard Mr. *Daley*, the plaintiff's father was to have the intereſt of *Ann*'s portion which was about 8000l. for his life: the truſtees agreed at that meeting not to conſent, unleſs *Ann*'s fortune was ſettled with the 600l. a year for the preſent maintenance of the plaintiffs. On the 29th of May, 1735, *Manley*, at the requeſt of the other truſtees, tranſmitted the ſaid propoſal (which had been before delivered to the truſtees in writing, and ſigned by the plaintiff *Daley*) to Mr. *Tayler* by letter, who was guardian to the Earl of *C.* The letter was to this effect, "We take the liberty to give you ſome further trouble in relation to Lady *Ann*, who we find has an inclination to marry the ſon of Mr. *D. Daley*; the young gentleman has ſent the incloſed propoſals to Sir *E. Deſbouverie*: as we are entire ſtrangers to Mr. *Daley*, we deſire you may inquire into his circumſtances, and how far he is able to make the ſettlement propoſed by his ſon, and if his father ſhould deſire to treat, it is our opinion my Lord's counſel ſhould be conſulted thereupon. Lady *Ann*'s fortune at preſent is from her grandfather *Smith*, about 3400l. beſides what was left by her father out of his *Iriſh* eſtate, which will make the whole as we compute up-

wards of 7000l. and she has a further expectancy in case of my Lord's death, of a moiety of what my Lady *C.* left my Lord, if she marry with our consent, if not, she will loose it, and the whole will go to her sister, unless she should likewise marry without our consent, in which case the whole goes to Sir *H. Parker.* This is all the influence we have over Lady *Ann*, and she might with her fortune marry much better: *yet if Mr. Daley's father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it.* Lady *Ann* very soon after her mother's death, went to her father's relations without our privity or consent, and how far they may have perverted her we cannot tell, but she and the young gentlemen both declare themselves protestants, and say that this is the reason my Lady's father's relations are against the match. We are your most humble servants, *J. Manley*, &c." Mr. *Tayler* in answer to this letter, sent the trustees the following proposal from Mr. *Daley*, the father;—4000 acres of land to be settled to the use of *Daley*, sen. for life, remainder to *Daley*, jun. for life, with remainder to his first and every other son in tail. *Daley*, sen. hath agreed, that he will lay out the portion at interest or in the purchase of lands which shall be settled to the same uses. 600l. *per annum* present maintenance, 600l. *per annum* jointure, if no issue, but if issue, 500l. *per annum.* It appeared by a letter from Sir *E. Defbouverie* to Mr. *Tayler*, that all the trustees refused to consent upon any other terms than on Lady *Ann*'s portion being settled with 600l. *per annum* for their present support and her jointure, and the reason they gave was, that if *Daley*, the father should have the interest of Lady *Ann*'s fortune, which at 6*l. per cent.* the common interest in *Ireland* produced 540l. *per annum*, he in effect parted with nothing at present. The plaintiff *Daley* applied several times afterwards to *Manley* for his consent, but he told the plaintiff he thought the terms insisted on by him and his co-trustees were reasonable, and that he never would give his consent on any other, and cautioned the plaintiff against the ill-consequences of marrying without the consent of the trustees, and told him if he would consult counsel, and they should be of opinion that the trustees were unreasonable in their demand he would be ready to submit, but not otherwise. The plaintiffs having married in June, 1735, the bill was filed to compel *Daley* the father to a specific execution of the marriage-agreement, or that such other reasonable settlement might be executed by him as the court should direct, and that the trustees might join in the settlement, or sign their consent so as to prevent a forfeiture, and that they might execute the trusts of the two deeds poll. And

Lord *Hardwicke*, C. expreſſed himſelf to this effect, "Firſt queſtion, whether the condition annexed to the power, is ſuch a condition as Lady *Clanrickard* could annex? Secondly, whether there is evidence ſufficient on the part of the plaintiffs to ſhew, that their marrying was with the conſent of the truſtees? As to the firſt I think Lady *C.* had a power to annex the condition. As to the ſecond I think the condition has been well performed. The proviſo in both deeds is very harſh and unreaſonable, and therefore a court of equity will be juſtified in taking as great a latitude as may be in the conſtruction of it, to prevent a breach: if the marriage were ſuch as was fit, there could be no objection either to the perſon or to the eſtate of the plaintiff Mr. *Daley*, neither was it a diſparaging ſettlement: it appears through the whole cauſe that the lady had a ſtrong inclination for the match, and therefore in ſuch a caſe, the truſtees ſhould have conſidered themſelves in the light of a parent, and ſhould have readily come into a conſent. It is manifeſt both from the letter and diſpoſition of Mr. *Manley* one of the truſtees, that he agreed to the propoſal, and gave his conſent that it ſhould be a match, and the letter is likewiſe evidence that the truſtees in general approved of the perſon, behaviour and quality of Mr. *Daley*, and it is alſo evidence of their conſent to the marriage, provided Mr. *Daley*, the father, will make the ſettlement he propoſed. The words in the letter, *we ſhall be obliged to conſent*, mean from the neceſſity of the thing, and for the happineſs of the lady, and ought to be conſtrued a preſent conſent, that if the father would make the ſettlement, they would not break the match. I have been conſidering the evidence of the conſent. As to conditions, whether precedent or ſubſequent, where they are in reſtraint of marriage, the court have always put the moſt favourable conſtruction upon them to prevent a forfeiture, and for this purpoſe *Farmer* v. *Compton*, 1 Ch. Rep. 1. is a very ſtrong caſe, and *Boſtock* v. *Treton*, 2 Ch. Rep. 13, under the names of *Wiſeman* v. *Foſter*, before Lord *Nottingham*, is a caſe in point. The truſtees have ſignified their conſent that a ſettlement ſhould be made according to the prayer of the plaintiff's bill, and therefore I will decree accordingly."

(*f*) *C.* bequeathed to the defendant *Hall* and others 1500l. 3-per cent. Annuities in truſt for the uſe and benefit of the plaintiff *Mary*, to be paid and transferred to her upon her marriage with the previous conſent in writing of her mother, if living, but if then dead, with ſuch conſent of her father; and in caſe ſhe ſhould marry without ſuch conſent during the life of her father and mother or either of them, then the legacy

(*f*) Mercer v. Hall, 4 Bro. CC. 326.

was to be ſettled to the ſeparate uſe of herſelf and children, in ſuch manner, &c. as the ſurvivor ſhould appoint, and in default of appointment, to be equally divided among them: and in caſe *Mary* ſhould happen to die ſole and unmarried, or if ſhe ſhould marry *without ſuch conſent* as aforeſaid, without leaving iſſue of her body at the time of her death, then the legacy was to ſink into the reſidue of her perſonal eſtate, which ſhe diſpoſed of by her will, and appointed her daughter *C.* executrix. *R.* and *J. Slaughter*, *Mary*'s father and mother, died before her marriage with the plaintiff, but they before their deaths conſented to her marriage generally, and ſigned a paper-writing to this effect, "In purſuance of a clauſe in the will of the late Mrs. *C.* this is to certify, we do give free leave and conſent to our daughter *Mary* to marry whomſoever ſhe chuſes: and whereas power is veſted in us to ſettle a legacy of 1500l. left her by the ſaid will, in what manner we ſhall think proper, we do hereby give her full power and ſole command and poſſeſſion thereof to ſettle and diſpoſe of *according to her own inclination*, without being ſubject either to the limitations and conditions mentioned in Mrs. *C.*'s will or to the authority of her huſband," ſigned, &c. *R. S.* and *J. S.*—After the deaths of the father and mother, the plaintiffs intermarried, and there were no children. The queſtion was whether *Mary*'s marriage was had with ſuch conſent as the will required? And the *Maſter of the Rolls* ſaid, "he was clear that the plaintiffs were intitled to the legacy; that the conſent was only neceſſary, during the life of the father and mother or of the ſurvivor, and could only be intended of a marriage during their lives: and although the teſtatrix intended there ſhould be a conſent to the *particular* marriage, the intention was ſufficiently anſwered by this general conſent. That a conſent after the marriage had been held ſufficient where it was not required to be in writing: and that all theſe ſorts of reſtraints were conſidered in ſuch a way as to favour legatees, where there was nobody to take on default of conſent: if the material part of the condition was complied with, the legacy was held good. She was intitled to the legacy excluſive of the writing; for under the power, the father and mother could not have appointed the whole to the daughter, but muſt have given ſomething to the children, if there had been any."

The ſame rule of conſtruction applies to inſtances in which the perſon impoſing the neceſſity of marriage with conſent by his will, gives his aſſent prior to his death, to the marriage of the legatee.—Thus,—

(*g*) *A.* having four daughters, deviſed to truſtees all his lands,

(*g*) Clerk *v.* Lucy, 8 Vin. Abr. Tit. "Deviſe," p. 154. pl. 11. 2 Vern. 720, S. C.

&c. in *E.* and *F.* or either of them, in trust for his daughter *B.* until her marriage or death, and if she married with the consent of her trustees, then for her and her heirs, or for such person as she should appoint, &c. but in case she married without the consent of her trustees, and forfeit her estate, then to her other sisters equally, &c. Afterwards the plaintiff married *B.* with the consent and approbation of her father, upon which occasion he settled part of the lands devised to her *prout* settlement, and died without altering his will: Question, if the devise to *B.* in fee upon condition of marrying with the consent of the trustees was dispensed with, or performed by her marriage in the life of her father with his consent? And Lord *Cowper*, C. "By the marriage with the consent of her father, the condition is dispensed with, and the devise becomes absolute; for conditions of this kind, be they conditions precedent or subsequent, are in the nature of penalties and forfeitures, and if the *substantial* part and intent be performed, equity should supply small defects, and favour the devisee. It is admitted here is no forfeiture; and shall I take away the estate from the first devisee, when it cannot go to the devisee over, only to let it descend to the heirs at law, which certainly was never the intent of the testator. Decree for the plaintiff the wife, all the lands devised to her by the will."

Upon the same principle, if there be any improper conduct in the person whose consent is required, as if he permit and encourage the courtship in the beginning, and afterwards without sufficient reason refuses to consent to the marriage, in these instances, the first acts will be considered such an implied consent, as to prevent a forfeiture upon marriage without any further consent.

(*b*) *A.* bequeathed to his grand-daughter *C. B.* 6000l. to be paid at her day of marriage, provided she married with consent of her father, but if she died unmarried, or married without such consent, then over. The father encouraged proposals by Lord *Netterville*, representing her fortune to be 15,000l. but afterwards drew back, because he could not make good his part of the proposals. The parties married privately, so that there was no consent of the father obtained, to remedy which, and prevent the forfeiture, articles were framed, making a proper settlement, and a second marriage was had in face of the church. This was admitted, and the probable reason of the father's drawing back was, because the bank in which he was engaged, was tottering. It was decreed for the portion, because of the courtship, and because it was a reasonable and pro-

(*b*) Campbell *v.* Netterville, cited 2 Vef. 534. on appeal from the Chancery in Ireland.

per match, from which the father, but for that circumſtance, would not have withdrawn; the decree was affirmed on appeal to the houſe of lords.

(*i*) *B.* after marriage, ſettled ſeveral eſtates in *England* and *Ireland*, in default of iſſue-male, upon his two daughters *Dorothy* and *Lucy*, in ſtrict ſettlement, with croſs remainders, that is, a moiety to each, with a proviſo, in caſe either of them ſhould marry before they reſpectively attained 21, without the conſent of their mother, if living, firſt had in writing under her hand, or if ſhe ſhould be dead, without the like conſent of *L. B.* and *C. S.* or the ſurvivor, the eſtate for life limited to them or either of them that ſhould ſo marry without conſent, ſhould thenceforth ceaſe, and *L. B.* and *C. S.* ſhould immediately after ſuch marriage, enter and receive the profits, for the life of ſuch daughters reſpectively, upon truſt to pay the rents and profits into the proper hands of ſuch daughter or daughters, for her or their ſole uſe, or as ſhe ſhould appoint, it being his intent and meaning, that the ſame ſhould be for the peculiar maintenance and expence of ſuch daughter or daughters ſo marrying without conſent as aforeſaid, and that their huſbands ſhould in no wiſe intermeddle therewith, nor the ſame be liable to the debts of ſuch huſband or huſbands. *Lucy* married Lord *Strange*, and it was proved that her mother made the firſt offer of the match; that ſhe received him at her houſe, and encouraged his addreſſes, and was in treaty with him, and Lord *Derby* his father, about the ſettlement; but that afterwards, ſome little differences aroſe, with regard to the ſettlement, which were but trifling, and ſhe thereupon declared, that ſhe would have nothing to do with the *Derby* family: that ſhe then took offence at Lord *Strange*, on a ſtory ſhe had heard of his having reflected upon her, and declared, that ſhe would not conſent to the match. And by Lord *Hardwicke* C. "*B.* the father has uſed the very means to induce his daughters to break the obligation he meant to lay upon them, for if they were fond of power, and to get a ſeparate right to the eſtate, independent of the perſons they intended to marry, they had nothing to do, but to marry without their mother's conſent. Queſtion, whether here are ſufficient grounds to vary the right of the parties? It appears to have been a very proper match; no objection made to Lord *Strange* on any account, till the mother was told a ſtory of his having reflected on her. She appears to have firſt propoſed the match, and encouraged his addreſſes. The caſe falls within the reaſon of *Meſgrett* v. *Meſgrett*, and *Daley* v. *Deſbouverie* (*k*); the foundation of which is, that the withdrawing conſent, after ſuch encouragement, is a deluſion on the young folks; and

(*i*) Strange *v.* Smith, Ambl. 263. (*k*) *Supra*.

it is not to be imagined after they had fixed their affection by such encouragement, they will be easily induced to alter it, Lady *Strange*, therefore, is not intitled to her separate use."

It is a general rule, that in all cases where marriage with consent is required as a condition, the marriage must take place, though without consent, in order to intitle the legatee to demand the legacy (*l*).

It seems that where the condition requires the legatee to marry a person of a particular name, the mere arbitrary assumption of the name will not be a sufficient performance of the condition, but that an act of parliament will be necessary, otherwise the party might assume the name for the purpose of receiving the legacy, which when obtained, he might re-assume his own legal name, and defeat the intention of the gift. Thus,—

(*m*) *A.* bequeathed to his kinswoman *Mary Barlow*, 1000*l.* to be paid at 21 or day of marriage, but in case she died before that age, or unmarried, he gave the 1000*l.* to his kinsman *Charles Barlow*, to be paid at 21. The will then proceeded in this manner, "In case the said *Mary Barlow* shall marry with any person of the firname of *Barlow*, then I give her the *further* sum of 1000*l.* to be paid on the day of such marriage, with a *Barlow* aforesaid, but if the said *Mary Barlow* shall die unmarried, or shall marry a person not bearing the firname of *Barlow*, then I give the said last mentioned sum of 1000*l.* unto the said *Charles Barlow*, to be paid as aforesaid." Soon after the testator's death, *Mary* married the respondent *Robert*, who was then an apprentice to a coach-harness maker, and whose father's name was *Bateman*, and who was himself christened, called, and known by the name of *Robert Bateman*, but the respondent on the occasion of the marriage and not before, assumed the name of *Barlow*, to intitle himself to the additional legacy. The appellant *Charles* being under 21, and advised that by the marriage, he became intitled to the conditional legacy of 1000*l.* filed a bill against *Robert* and his wife, and against the executors for payment of that legacy. But the *Master of the Rolls*, on the 13th of July, 1730, dismissed the bill, as *Mary* did in fact marry a person who bore the name of *Barlow*, and this decree was soon afterwards signed and inrolled. Doubts however, still subsisting as to the right to this legacy; upon a bill filed by *Robert*, by the name of *Robert Barlow* and *Mary* his wife, against the executors, residuary legatees, and *Charles* for payment of the two legacies of 1000*l.* the *Master of the Rolls*, before whom the cause was heard on the 22d of

(*l*) Atkins *v.* Hiccocks, 1 Atk. 500. and Elton *v.* Elton, 3 Atk. 504. *supra*, page 174. (*m*) Barlow *v.* Bateman, 4 Bro. Parl. Ca. 194. 3 P. Will. 65. S. C.

July, 1734, did not think proper to vary his former decree, with reſpect to the *conditional* legacy of 1000l. and therefore gave the uſual directions for the payment of both the legacies, but this decree was neither ſigned nor inrolled. *Charles* however, appealed from both the decrees, inſiſting that it was the manifeſt intention of the teſtator, that a perſon of his own name ſhould, by marriage with the reſpondent *Mary*, have the benefit of the legacy of 1000l. conditionally deviſed to her; or in default thereof, that the appellant ſhould have it: for by the expreſs words of the will, this legacy was given to the reſpondent *Mary*, upon a condition precedent, namely, that ſhe ſhould marry a perſon of the ſirname of *Barlow*; and that on the day of ſuch her marriage with a *Barlow*, the legacy ſo deviſed was to be paid to her. But as ſhe had not performed this expreſs condition, ſhe could not be intitled to the legacy. That the reſpondent *Robert*, could not previous to his marriage, legally aſſume the ſirname of *Barlow*, otherwiſe than by act of parliament, ſo as to intitle himſelf to this legacy; for if his aſſuming that name in the manner he had done, ſhould be ſufficient, he might in the ſame manner, after receiving the legacy, re-aſſume his own legal name, and thereby wholly fruſtrate and defeat the teſtator's intention. It was therefore hoped, that for theſe reaſons, both the decrees, ſo far as they related to the conditional legacy, would be reverſed. On the other ſide, it was ſaid, that as the laſt decree was not ſigned and inrolled, no appeal lay from it; and as to that part of the firſt decree of which the appellant complained, it was apprehended to be very juſt and right; becauſe conditions annexed to legacies, which go in reſtraint of the freedom of marriage, are conſidered void by the civil law, and are not at all favoured in courts of equity; and becauſe the intention of the teſtator in this caſe, was fully complied with, by *Robert*'s bearing the name of *Barlow*, before and at the time of, and ever ſince his marriage; which was all that was required by the teſtator's will. But it was *declared*, that the appellant was intitled to the legacy of 1000l. conditionally bequeathed to him by the will: and therefore the decree of the 13th of July, 1730, was reverſed; but the decree of the 22d of July, 1734, not having been ſigned by the chancellor, it was declared, that the appeal from that decree was brought irregularly; and it was therefore diſmiſſed; with liberty notwithſtanding, for all parties to apply to the *Chancellor*, if they ſhould think fit to re-hear the cauſe.

If the legatee once marry with the conſent required, the condition having been complied with, loſes its force and effect, ſo that the *ſecond* marriage of the legatee *without* conſent will not be a forfeiture (*n*).

(*n*) Hutcheſon *v.* Hammond, *infrà*.

It seems, in general, that when the assent of executors or trustees is required to the marriage of the legatees, it must be given *before* or *at the time* of the marriages, and not afterwards, for a subsequent consent can never have the effect of divesting an interest already vested in other persons upon a breach of such conditions, without express words for the purpose: accordingly in the case of *Reynish* v. *Martin* (*o*), the daughter having married without the consent of the trustees; although they afterwards declared their assent in writing, Lord *Hardwicke* observed, that their subsequent approbation of the marriage was immaterial, as it could not amount to a performance of the condition, or dispense with a breach of it. It seems, however, that when the terms in which such conditions were framed, were sufficiently large to admit of subsequent consent as a good performance, the court has given full effect to the words, and decided in favour of such after assent.

(*p*) *A.* having only one child, a daughter, devised to *N. Humfrey*, as trustee, all his real and personal estate, in trust, out of the rents and profits to pay his wife, and his daughter, until the latter should attain 21 or die, an annuity of 40l. a-piece; and if his daughter married with the consent *and* approbation of *N. Humfrey*, testified in writing, the whole of the premises with the interest and produce of what should be raised thereout, during the continuance of the annuity, more than what should be sufficient to satisfy the same, should on the day of his daughter's marriage, be paid and conveyed to the person she should marry, or to such uses as upon the marriage should be agreed on. But if his daughter married without such consent *or approbation*, or should die unmarried, then the whole of the premises should, after the death of such survivor, be paid and applied unto and among the sons and daughters of his present and late sisters, who should be living at the death of such survivor, (except his nephew *H.*) as tenants in common.—The daughter married within a month after the death of her father, without having applied to *N. Humfrey* for his consent; but about eleven months after the marriage, his approbation in writing was obtained, and it was proved, that he at the same time declared, his belief, that he should have consented before the marriage, if he had been requested. Whether the daughter had forfeited the real and personal estate by the marriage, depended upon two questions; 1st, Whether there ought to have been a previous consent by *N. Humfrey*? 2dly, Whether as the daughter was the testator's heir at law, she ought not to have had notice of the condition? And by Lord *Hardwicke*, C. "Cases of this kind have undergone various fates, but of late, courts have

(*o*) *Supra*. (*p*) Burleton (*q*) Humfrey, Ambl. 256.

done all they can, to prevent a child being ſtripped of a proviſion, eſpecially where there are no aggravating circumſtances, and the end of the father's intention and caution has been attained; they have laid hold of and made ſuch conſtruction of words, which they would not do in other caſes. The determination in *Harvey* v. *Aſton* (*q*) was unavoidable; and there were groſs circumſtances attending the breach of the condition in that caſe. The preſent is the caſe of an only child, who by forfeiting this deviſe, would loſe all her proviſion; the court, therefore, will not make ſuch conſtruction, unleſs compelled to it by the circumſtances of the caſe, and precedents which are exactly the ſame. There are two queſtions, 1ſt, What is the conſtruction of the will? 2dly, What is the law on ſuch conſtruction, both as to the real and perſonal eſtate, which are connected together? As to the firſt, the teſtator has diſpoſed of the real and perſonal eſtate to the truſtee abſolutely in point of law. The condition in the former part imports to be a precedent condition, but in the latter, it is expreſſed in other words. In the firſt part it is conſent *and* approbation, in the latter conſent *or* approbation. It is argued, that conſent and approbation muſt be taken to mean the ſame, that is, *conſent*, but I am not compelled to conſtrue them ſo. Queſtion, whether the court ſhall conſtrue the word *and* in the former part to mean *or*, or the word *or* in the latter part, to mean *and*? I am at liberty to conſtrue them either way, and ſhall conſider it in the disjunctive, and then this ſubſequent approbation is ſufficient, and a previous conſent was not neceſſary. It was but reaſonable to give the truſtee ſuch a power of approving after the marriage. The daughter has married a gentleman without the previous conſent of *N. Humfrey*, but he has approved of the match ſince: and what is material and weighs with me, there is not a ſingle circumſtance offered to impeach the propriety of the match: therefore I muſt take it to be ſuch a match as the truſtee might reaſonably have approved, and which the father would.—2dly, Suppoſe *approbation* was conſidered in this caſe as ſynonimous to *conſent*, and ſuch conſent was neceſſary to be previous to the marriage; queſtion, whether the daughter has forfeited the real and perſonal eſtate for want of ſuch conſent? As to the real, this caſe comes within the reaſoning in *Francis*'s caſe, (8 Rep.) that notice is requiſite to work a forfeiture in an *heir at law*, but not in a *ſtranger*; the latter can only take under the inſtrument which impoſes the condition, but the heir is ſuppoſed to enter and claim by deſcent, and has no occaſion to know the deviſe. This diſtinction is allowed to be law in *Fry* v. *Porter*, (1 Mod.

(*q*) Supra.

86—300) and in *Mallon* v. *Fitzgerald*, (3 Mod. 28. Skin. 125.) which laſt caſe was of a deviſe in reſtraint of marriage. Objection, there is a condition precedent; for the eſtate is deviſed to *N. Humfrey* and his heirs, and nothing is given to the daughter, but on condition of her marrying with conſent; and therefore ſhe does not take by deſcent; but that makes no difference, for this is a mere truſt, and the daughter as heir at law will take the beneficial intereſt till the marriage: and therefore it operates as a condition ſubſequent.—2dly, as to the perſonal. There is a great difference as to the deſcent of the real and perſonal (*r*) eſtate in general. The latter veſts in the executor for the next of kin: but here they muſt both go together: it was the teſtator's intention, that if the whole was not forfeited, no part ſhould. But if the perſonal will not follow the real, on this ſecond point of notice, yet on the firſt point it will go to the daughter, as the condition is performed by the ſubſequent approbation of the truſtee."

If a legacy or annuity be given to a married woman, upon condition that ſhe releaſe her intereſt in lands; in order to perform the condition the releaſe muſt be by fine (*s*).

(*r*) See Chauncy *v.* Graydon, *infrà*. (*s*) 9 Mod. 79.

SECT. III.

Of giving Notice of Conditions.

IT ſeems that legatees muſt obtain information of the conditions annexed to their legacies, as the executors are under no obligation to give notice of them, unleſs by particular direction; whence it follows, that it will not be a ſufficient excuſe to legatees in order to prevent a forfeiture, to alledge that they had no information of the conditions upon which their legacies were given. Thus,—

(a) *A.* having appointed his nephew *Gabriel Tahourdin*, and three other perſons executors, bequeathed 1500l. South-ſea ſtock, to his executors, in truſt to pay the yearly dividends to his brother *C. Badouin* for life, and after his death, to pay the capital among the ſeven children of his ſaid nephew, in the manner and proportion therein-after directed, concerning 7000l. South-ſea ſtock, deviſed for the uſe and benefit of the ſame ſeven children. He alſo gave to his executors, 7000l. South-ſea ſtock, in truſt to transfer 1000l. thereof, to each of the ſeven children of his nephew *Gabriel Tahourdin*, viz. *Elizabeth*, *Gabriel*, *Mary*, *Rene*, *Dorothy*, *Peter*, and *Caſſandra*, at their reſpective ages of 21 or days of marriage, they marrying with the conſent of *Gabriel Tahourdin*, the father, or his executors, or the ſurvivors or ſurvivor of them, to be teſtified by their ſubſcribing their names to the marriage articles, or ſettlement of the ſame children, as witneſſes, or by being parties thereto, and executing the ſame: and in caſe any of the children ſhould die before 21, or ſhould marry without conſent as aforeſaid, then the ſhare or ſhares in the 7000l. of ſuch child or children as ſhould die, or marry without conſent, ſhould go and be transferred, ſhare and ſhare alike, to the others of the ſeven children at 21, or marriage with conſent as aforeſaid. The teſtator died ſoon after the execution of his will,—his brother *C. Badouin*, and his nephew *Gabriel Tahourdin* alſo died. *Caſſandra* married the defendant *Graydon without conſent*, and on the day after their marriage, *Peter* married without conſent. *Gabriel*, jun. having attained 21, died before the forfeitures accrued by his ſiſter *Caſſandra*'s and *Peter*'s marriages without conſent. *Mary* married *Chauncy*, and *Elizabeth* and *Dorothy*

(a) Chauncy *v.* Graydon, 2 Atk. 616.

were either married after 21, or with consent. The bill was filed by the persons who married the children of *Gabriel Tahourdin* the elder, with consent, for their proportions of the two shares in the 7000l. forfeited by the marriages of *Cassandra* and *Peter*. And Lord *Hardwicke*, C. "Several questions have been made at the bar: 1st, whether there is any forfeiture at all? 2dly, What will be the extent of it? 3dly, What shares the parties claiming under the forfeiture are to take? Now as to the first, it is extremely plain, there is a forfeiture incurred by a marriage *without consent*, or otherwise this case would not be consistent with the rest of the cases on this head. The only excuse attempted to be made is, that the defendants had no notice of the condition in the will. I shall lay this out of the case, for where there is a condition annexed by will to a devise of real or personal estate, and no notice required to be given, nor any person obliged to give notice, there the legatees must perform the condition, or cannot be entitled: and if they do not, where there is a devise over, a forfeiture incurs. Nor in the reason of the thing, do I see any difference between real and personal estate, and therefore where no person is bound to give notice, the parties must themselves take notice. It is said, the *executors* should have given *notice*, but the testator has laid no such obligation upon them, neither do the executors take any beneficial interest, whether the condition be performed or broken. The second question is, what will be the extent of the forfeiture? Whether the forfeitures are confined only to the 7000l. or by relation extend to the 1500l. likewise. This is not quite so clear, but I am however of opinion, that the forfeiture extends to both: nor can I make any other construction, without contradicting the testator's own intention, and making the court contradict themselves. For the testator's, putting the two sums in different clauses, was on account of the gift of the produce of the 1500l. stock to his brother, during his life, or otherwise he would have thrown the whole into one clause. The original proportion would have been a division into sevenths, but it is different when one or two or more of the devisees marry *without consent*, and therefore the proportions arise, and are to be regulated by the several contingencies as they happen. The word *manner*, as has been rightly argued, takes in every thing. Suppose an estate be limited to one for life, and to *B.* on certain conditions and restrictions, and to *C. in formâ prædictâ*, this will take in every condition and restriction in the preceding limitation to *B.*; this expression may be found in conveyances even to this day, but very commonly in admittances to copyholds. The third question will be what are the shares and proportions the several parties claiming under the forfeiture are to take. *Cassandra* was married on the

25th of July, and *Peter* the next day. It is insisted by *Peter's* counsel, that he is intitled to a share in *Cassandra's* fortune. It would be very extraordinary, that *Peter* by marrying *without* consent, should forfeit his own fortune, yet take advantage of the very same offence in his sister which he had committed himself. See the clause in the will beginning with, *and in case any of the said children should die, &c. the share or shares, &c.* What is the meaning of the words *share or shares?* Why, the whole that the children shall be intitled to, as well the *original*, as the contingent portions shall go and be transferred, &c. and this brings it to the case of Mr. *Bendysh* in *Wrottesley* v. *Wrottesley*, (2 Atk. 584) where I determined in the same manner on the word *portion*, which is not more general than the word *share* in the present case. 'And did thereby also give to his said executors, &c. in trust, to transfer, &c. to be at their respective ages of 21 *or* days of marriage, *they marrying with the consent*, &c.' It is said, this is a condition not annexed to the age of 21, but confined to the day of marriage only. But if they marry without consent before 21, the condition is broken, and it was the intention of the testator, that there should be no new time which should arise, but the legacy to be absolutely gone. Therefore, this making a forfeiture of the *whole*, avoids the absurd construction, that they may take advantage of the very same breach of condition, of which they have been guilty themselves. As to the point relating to *Gabriel*, I am of opinion, as he attained his age of 21, it vested in him, notwithstanding he died before the contingency of his brother and sister marrying without consent happened; and therefore his representative is equally intitled to a share of the forfeiture with the other children, as that fact has taken place, and the dying before, makes no difference; for where either real or personal estate is given upon a contingency, and that contingency does not take effect in the life of the first devisee, yet if *real* his heir, if *personal* his executor, will be intitled to it; for though in law, *a possibility* is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable and transmissible to the representative of the devisee." His lordship declared, that *Chauncy* and wife were intitled to one-fifth part of the forfeited portions; *Western* and wife to another fifth; *Small* and wife to another fifth; *Rene* to another fifth; and the wife of *Small* as administratrix to *Gabriel* the son, to the remaining fifth, subject to distribution as part of his personal estate; and as to *Gabriel's* share under the will, and the proportion of the forfeited shares vested in his administratrix, his lordship said, they must be divided into *six* shares, and the forfeiting children were to take equally with the others.

With regard to real estate, a distinction seems to have been

eſtabliſhed between an *heir at law* and a *ſtranger*, and to this effect, that notice is neceſſary to be given to the heir, before a forfeiture can attach for a breach of teſtamentary conditions, but that no ſuch notice is required to be given to a ſtranger. The reaſoning is this; the heir has a right paramount the will, viz. by deſcent, and he is preſumed to enter and claim under that title, therefore, as the deviſe is not neceſſary to give him a title, he will not be preſumed to know any thing of it, or of the condition before notice: but the *ſtranger* has no title, except under the will which impoſes the condition, he is therefore preſumed to be cognizant as well of the condition, as of the deviſe (*b*).

(*b*) Burleton *v.* Humfrey, *ſupra*, and the caſes there referred to. Whaley *v.* Read, Lutw. 804—809.

CHAP. VIII.

Of the Payment and Appropriation of Legacies.

Sect. I.—Of the Payment of Legacies.

I. WHERE no time is appointed by teſtament for payment of legacies, they muſt in general be paid out of the teſtator's aſſets, at the expiration of a year after his death; and if no fund be aſſigned for the purpoſe, ſuch legacies muſt be paid in the currency of that country where the will was made.

(*a*) *A.* being ſeiſed in fee of lands in *Ireland*, and reſiding with his wife in *England*, by will made in *England*, deviſed his Iriſh eſtate to a truſtee, who alſo lived in *England*, for 500 years, in truſt out of the rents and profits to pay 80l. a year, to his wife for life. It was inſiſted, that the fund being lands in *Ireland*, and no place appointed where the money was to be paid, the annuity of 80l. ought to be paid in *Iriſh* Money, which was leſs in value than *Engliſh*, and that there ought to have been a deduction for the charge of remitting the money from *Ireland* to *England*. But by Lord *Macclesfield*, C. "The will being made in *England*, and the huſband and wife and truſtee all living in *England*, and this being a proviſion for a wife, the 80l. a year ſhall be intended 80l. *per annum* of that country where the will was made: it cannot be conceived, that the teſtator thought of ſending his wife every year to *Ireland* to fetch her annuity. If one by will made in *England*, give a legacy of 80l. it muſt be intended *Engliſh* money, and it will be the ſame thing though charged on land in *Ireland*; and by the ſame reaſon that a ſingle payment of 80l. will be taken to be *Engliſh* money, ſo ſhall an annual payment of 80l. receive ſuch conſtruction. And this is ſtill ſtronger in regard it appears on the proofs that the teſtator had made leaſes of part of his *Iriſh* eſtate, reſerving juſt ſo much rent to be paid in *London* free from taxes, as would be ſufficient to pay all the annuities given by the will." Decree the annuity to be paid in *Engliſh* money, without any charge of remittance.

(*b*) *B.* at the time of making his will, and for ſeveral years before, being reſident at *Jamaica*, bequeathed legacies to be paid in *ſterling* money in the firſt place, and the two legacies

(*a*) Wallis *v.* Brightwell, 2 P. Will. 88. (*b*) Saunders *v.* Drake, 2 Atk. 465.

immediately following theſe (one of which of 300l. was the plaintiff's) he gave generally, without ſaying to be paid in *ſterling* money: then he deviſed his real eſtates, and gave ſome ſpecific legacies, and laſtly, ſeveral more legacies to be paid in *ſterling* money. The plaintiff filed his bill for the legacy of 300l. in *ſterling* money: and by Lord *Hardwicke*, C. "It is impoſſible for me to tell what was the teſtator's intention, but I muſt make a conſtruction from the words. The general rule that has been laid down on the part of the defendant is true: for if a bond be given at *Dublin*, or a note at *Jamaica*, it muſt be paid in the current money. So if in either place there is a ſum of money left by will, it ſhall be paid to the legatee in current money. Then the queſtion will be, if there is any thing in the preſent caſe to take it out of the general rule. If the teſtator had given all his legacies generally, they muſt have been paid in *Jamaica* money, nor would the legatees living in *England*, have made any diſtinction, for *the reſidence of the perſon deviſing* muſt decide it. Every thing in this will ſhews it muſt mean *Jamaica* money, for if all the legacies given generally would confine it to *Jamaica* money, *a fortiori*, if the teſtator gives ſome *ſterling*, and others generally, the latter muſt be paid out of *Jamaica* money, for his expreſſing himſelf differently ſhews a different intention. It is ſaid on the part of the plaintiff, that his legacy immediately following the *ſterling* legacies, it muſt be taken as a continuation of the ſame intention. There might have been ſomething in this argument, if there had not been in the latter end of the will, other *ſterling* legacies, which takes away the force of this argument intirely. There has been an endeavour likewiſe to raiſe an argument for the plaintiff from the teſtator's effects being partly in *Jamaica*, and partly in *England*; and to be ſure if the teſtator had ſeparated his funds in *Jamaica* and *England*, and had charged his legacies which he has given generally upon the *Engliſh* money, it would have been an argument of conſiderable weight: but as it is a deviſe of a compounded reſidue, and he directs his debts to be paid generally out of the whole perſonal eſtate, without ſeparating the funds, this argument falls to the ground; and therefore upon the whole, the plaintiff muſt take his legacy in *Jamaica* money." The maſter was directed to compute intereſt, from the end of a year after the teſtator's death, *according to the rate of intereſt in the iſland of Jamaica* (*c*).

(*d*) *C.* late Biſhop of *Clogher*, in *Ireland*, bequeathed ſeveral legacies expreſsly to be paid in *ſterling* or *Engliſh* money, and others indeterminate as to the fund. The will being made in

(*c*) As to the rate of intereſt, ſee Malcolm *v.* Martin, *infrà*, chap. "of intereſt upon legacies." (*d*) Pierſon *v.* Garnet, 2 Bro. CC. 39.

Ireland, the queſtion was, whether the latter legacies ſhould be paid in *ſterling* money, or *Iriſh* currency? And by the *Maſter of the Rolls*, "the caſe cited (*e*) is concluſive; wherever the will is made, the legacies muſt be paid in the currency of that country, unleſs the teſtator has made a ſeparate diſtribution of his *Engliſh* and *Iriſh* property. I therefore declare, that the unaſcertained legacies muſt be paid according to *Iriſh* currency."

(*f*) *D.* late of the Iſland of *Antigua*, bequeathed to his ſiſter the intereſt of 1000l. *ſterling* for life, and at her death, that ſum to be equally divided between the plaintiffs the *Malcolms*; he alſo gave to the children of Mr. *J. G.* deceaſed, and the children of Mrs. *L.* the intereſt of 1500l. for life to be equally divided between them, and at their deceaſe, the ſame to be divided between the grand children of each Mr. *G.* and Mrs. *L.*; and appointed the defendant and others executors; queſtion, whether the legacy of 1500l. was to be paid in the currency of the iſland of *Antigua*, or in *ſterling*? And the *Maſter of the Rolls* "The teſtator has given by his will, ſome legacies deſcribed *as ſterling*, and others, among which this is, without that deſcription. I am ſatisfied by the caſe of *Saunders* v. *Drake* (*g*), that I muſt declare the *ſterling* legacies to be paid in *ſterling* money, and the others in *Antigua* currency."

When a legacy is given to an infant, generally, the executor cannot with ſafety to himſelf, pay it to the infant or to another perſon for his benefit, before he ſhall attain the age of 21. This was carried to a great length in the caſe next ſtated.—

(*h*) *A.* having a ſiſter who had four infant children, bequeathed 100l. a-piece to theſe children, mentioning no time of payment, and appointed the defendant executor and died. It was in proof, that the teſtator on his death-bed gave directions, that the executor ſhould pay theſe legacies to the father of the infants, that he might improve the money for their benefit. The executor, therefore, paid the four legacies to the father. Several years afterwards, the youngeſt child coming of age, there was an account between him and his father, and it appeared that the father was indebted to this ſon in 200l. including the 100l. legacy, and that the ſon paſſed the accounts, and accepted his father debtor for the ſame, which was urged as an agreement to the antecedent payment that had been made of this legacy to the father. After the ſon came of age, he never made any demand againſt the executor, ſo that there was an acquieſcence for nearly fifteen years. It happened afterwards, that

(*e*) Laſt caſe. (*f*) Malcolm *v.* Martin, 3 Bro. CC. 50. (*g*) *Supra*. (*h*) Dagley *v.* Tolferry, 1 P. Wil. 285. See the *Maſter of the Rolls*' comments upon this caſe, in Cooper *v.* Thornton, *infra*.

the ſon became a bankrupt, upon which the commiſſioners made an aſſignment of the bankrupt's effects to the plaintiff, in truſt for himſelf and the reſt of the creditors, and the plaintiff inſtituted this ſuit againſt the executor for the 100l. legacy, and obtained a decree at the *Rolls* for payment of it, on the ground that payment of the legacy to the father and guardian was illegal. An appeal being brought before Lord *Cowper*, C. he affirmed the decree, ſaying, "that if the decree was reverſed, it might encourage payments to parents and guardians, in wrong of infant children," but it was thought a hard caſe, and the depoſit ordered to be divided.

(i) B. bequeathed 100l. to each of the three children of Mr. *Philips*, and made the defendant executor, leaving him the bulk of her eſtate, provided he paid the three legacies of 100l. within a year after her death, purſuant to her will. The defendant within the time, paid into the hands of the children, their legacies; the eldeſt was then ſixteen years old, the next fourteen, and the youngeſt nine. The executor denied in his anſwer, that he knew the money ever came to the father's hands, and yet the children filed a bill againſt the defendant, to be repaid their legacies, ſuggeſting that their father had imbezzled the money paid them by the defendant during their infancy, and was inſolvent, and that it was a fraudulent payment to the father, and therefore the legacies ought to be paid over again. The Lord *Chancellor* aſked the executor's counſel if they knew any inſtance where an executor paying ſo large a ſum as 100l. into the hands of minors, had been allowed ſuch payments? He ſaid, that in inſtances where the legacies were very ſmall, the payment had been allowed by the court, and then added, "but in this caſe, notwithſtanding the ſum is above 100l. yet as the payment, by the executor to the children themſelves is ſo fully proved, and not at all controverted by the plaintiffs, and their loſing the benefit of it is owing to the negligence and inſolvency of the father, I will not ſtrain the rules of this court to make an executor pay it over again, eſpecially as he made this payment to ſave a forfeiture, it being an expreſs condition of his own taking under the will, that he ſhould diſcharge their legacies within a year after *B.*'s death." But the next day, his lordſhip ſaid, that upon looking into the caſes, he found this a very doubtful point, and unleſs the defendant would agree to give the plaintiffs ſomething he would not determine it, without taking time to conſider of it. The defendant upon this recommendation of the court, agreed to pay in 50l. to be divided between the three plaintiffs, and each ſide were to abide by their coſts; and it

(*i*) Philips *v.* Paget, 2 Atk. 80.

was made part of the decree, that the 50l. was paid by the conſent of all parties, and each of the plaintiffs were directed to releaſe the legacies under the will upon receipt of their reſpective ſhares. His lordſhip ſaid, that the caſe of *Dagley* v. *Tolferry* (*k*), muſt have ſome other circumſtances, for the rule was laid down too ſtrictly, that in all caſes where executors pay infants, legacies to fathers, in order to deter executors from ſuch payments, they ſhall be paid over again: and that although Lord *Cowper* confirmed the *Maſter of the Rolls'* decree, he ſeemed even by the report of the caſe to have had a remorſe of judgment at the time, for on looking into the regiſter's office it appeared, that his lordſhip ordered the depoſit to be divided between the parties.

3 By the late legacy act (*l*), it is declared that the executor may pay the legacy of an infant into the court of chancery, without ſuit, and when the legatee arrives at twenty-one, he may petition for it. If, therefore, a bill be now filed for ſecuring ſuch a legacy, the *coſts*, as heretofore, will not be allowed out of the teſtator's general aſſets.

(*m*) *A.* a legatee of 200l. with her huſband, filed a bill againſt the executor to have the legacy ſecured. The legatee was then an infant, but wanted only a few months of twenty-one. The executor having admitted aſſets, the uſual decree was made, that the legacy ſhould be paid into court, with coſts out of the teſtator's eſtate. The reſiduary legatee complained, that it was a hardſhip upon him to give coſts out of the eſtate in ſuch a caſe, where if the plaintiffs had waited for a few months, they might have received the legacy without the neceſſity of a bill. But by the *Maſter of the Rolls*, "I muſt give the coſts out of the teſtator's eſtate. If a teſtator wiſhes to prevent the coſts of ſuch a bill from falling upon his eſtate, he ought to give the legacy to a truſtee for the infant. For the future, however, I ſhall not give the coſts in ſuch a caſe, for ſince the late legacy act, the executor has nothing to do but under that act to pay the legacy into court, and then he has done, and the infant when of age, may petition for it. That ought to be known, as it will ſave great expence, and prevent the hardſhip to reſiduary legatees. Before that act, an infant-legatee was obliged to file a bill againſt the executor, and he could not ſafely pay the legacy without a decree. I ſhall therefore direct the coſts to be paid out of the eſtate in this inſtance, but I deſire it to be obſerved, that I ſhall not do ſo in future."

4 An executor will not be allowed any payments made for the uſe or benefit of infant legatees, except for *expreſs neceſ-*

(*k*) *Supra.* (*l*) 36 Geo. 3. cap. 52. ſect. 32. (*m*) Whopham *v.* Wingfield, 4 Veſ. Jun. CC. 630.

ſaries, and not even for theſe, if he apply part of the *principal* or *capital*.

(*n*) *A.* bequeathed all his perſonal eſtate to truſtees, in truſt among other legacies, to pay to *W. H. Green* (then an infant) 500l. and directed that ſuch of his legatees as were infants at his death, ſhould receive intereſt at 5-per cent, till their reſpective legacies ſhould be paid, which he deſired might be to boys at twenty-one, &c. and appointed the defendant and others executors. After the teſtator's death, and in the year 1780, the legatee, while an infant, went to the *Eaſt-Indies*, and ſoon after attaining twenty-one, ſold and aſſigned the legacy to the plaintiff, but the executors refuſing to pay it, for the reaſons ſtated in their anſwer, the bill was filed to compel payment. The executors ſet forth in their anſwer, that the father of the legatee having died inteſtate, and his mother having given up her jointure and proviſion for the benefit of her huſband's creditors, the legatee had no other proviſion than the legacy of 500l. and an equal ſhare with a brother and ſiſter in 670l. 3-per cent. annuities, upon the death of his mother, who having married the Rev. *T. Jones*, he had before the year 1780 expended in clothes, ſchooling, &c. for the legatee 150l. and he afterwards, with the approbation of the executrix, placed the legatee with the captain of an *Engliſh* veſſel trading to *America*, but the legatee diſliking that way of life, Mr. *Jones* gave the captain about 100l. to releaſe the engagement. That the legatee having ſhewn an inclination to a military life, Mr. *Jones*, with the approbation of the executrix, placed him at Mr. *Lochee's* military academy, and paid for expences there 100l. and an opportunity having offered of ſending the legatee with advantage in the ſervice of the company to *India*, he fitted him out for that country, and laid out 200l. in the expences of ſending and paying for his paſſage, and providing him with money, for his immediate expences there. The whole of the money advanced for the legatee amounted to 650l. which the executors conceived were neceſſarily and properly laid out for his maintenance and advancement; and in conſequence thereof, he gave a receipt to Mr. *Jones* for 500l. and before he ſailed for *India*, made a will, leaving the 500l. to him. They further ſtated that the intereſt had been paid to the legatee's mother while ſhe continued unmarried, for his maintenance, and afterwards to her huſband Mr. *Jones*. It was inſiſted for the plaintiff that no payments or advancements ſhould be allowed the defendants, except ſo much of the intereſt as had been applied for the maintenance or proviſion of the legatee, and more particularly againſt an innocent aſſignee for valuable conſideration. And the Lord *Chan-*

(*n*) Davies *v.* Auſten, 3 Bro. CC. 178.

cellor ſaid, every one who takes an aſſignment of a *choſe in action*, gives credit to the aſſignor, that there is no lien upon it. But in this caſe, his Lordſhip was not ſatisfied that the advancements were for neceſſaries; in particular he thought the 100l. to the *American* trader was too much. He therefore decreed the legacy to be paid with intereſt from the time when the legatee attained twenty-one.

(*o*) *B.* bequeathed 100l. to her brothers and executors *William* and *Edward Brown*, in truſt to place at intereſt during the minority of her great-nephew *John Lee*, and to apply ſuch intereſt for his maintenance and education, and when he ſhould attain twenty-one, then to pay or transfer the 100l. to him, but if he died before his legacy became payable, ſhe then gave it among his brothers and ſiſters equally. After the teſtatrix's death in 1774, both the executors proved the will, and *William Brown* expended much more than the intereſt of *John Lee*'s legacy in maintaining and educating him at ſchool. In 1781, *William Brown* put *John Lee* apprentice to a druggiſt at *Briſtol*, and gave with him a fee of 100 guineas. *William Brown* died in 1782 without iſſue, having given by his will to *John Lee* a legacy in the following words. "I give to my great-nephew *John Lee* 200l. which I direct ſhall be paid to him when he attains the age of twenty-two years," and he appointed his brother *Edward Brown* executor. *John Lee* attained twenty-one in 1786, and having attained twenty-two in 1787, he gave a power of attorney to—*Orchard*, reciting the legacy of 200l. and empowering *Orchard* to demand and receive for him all legacies left or to be left to him, as well as all other monies and effects due to him. Under this authority *Orchard* applied to *Edward Brown* as executor of his brother, for the legacy of 200l. which *Edward* paid on the 9th of March, 1787, for the uſe of *John Lee*, and for which *Orchard* gave a receipt. No notice was taken upon the occaſion of the legacy of 100l. nor was any demand of it made, until the bill was filed in 1797, by *John Lee*, then in the ſituation of a ſtage-coachman, againſt his uncle *Edward Brown*, for payment of that legacy with intereſt. *Edward* inſiſted that the legacy of 100l. was ſatisfied, and ſtated, that during the apprenticeſhip of the plaintiff, *William Brown* paid him eighteen guineas, beſides declaring, that he would afterwards give him 200l. to ſet him up in buſineſs. There was evidence of declarations by *William Brown*, that what he had advanced for the plaintiff, was ſo done, as the legacy due to him, and the defendant admitted aſſets. And by the *Maſter of the Rolls*, "I have looked into the caſes. I obſerve in *Cooper* v. *Thornton* (*p*), in which

(*o*) Lee v. Brown, 4 Veſ. Jun. CC. 362. (*p*) *Infrà*.

my decree was affirmed by Lord *Thurlow*, I took notice, that in *Dagley* v. *Tolferry*, the *Master of the Rolls* gave no intereſt, but he gave coſts; and in *Philips* v. *Paget*, Lord *Hardwicke* ſo much diſcountenanced the bill, that he in ſome degree forced the parties into a compromiſe. This caſe is very different from *Dagley* v. *Tolferry* (*q*) in this circumſtance; that theſe payments were not made to the father of the legatee, but were made abſolutely for his own benefit. Conſequently, any thing affirming it, after he was of age, would be ſufficient. There is nothing to fix him here but his own conſciouſneſs, that it ought to be affirmed. This is a very ungracious demand; and it will be with great reluctance that I ſhall give the plaintiff any thing: but I think, I cannot diſmiſs his bill. I do not feel, that ſince he came of age, he has done any thing to affirm this. If I am to give judgment, I have no difficulty in giving the 100l. with intereſt, from the time of filing the bill: but I will give no coſts on either ſide. There was no power in the executors of *B.* to apply more, than the intereſt of this legacy for the maintenance of the legatee. They were not at liberty under the truſt repoſed in them, to advance any part of the capital; though it would have been ever ſo much for his benefit. In 1786, when the plaintiff attained the age of 21, if with his eyes open, upon full conſideration of all that had been done for him during his minority, he had by any act admitted, that the advancement had been for his benefit, and he was willing to accept it as a ſatisfaction, it was unqueſtionably competent to him to do ſo: but the fact is, that coming of age after the death of his uncle, he never made any demand: but in 1787, being in ſome diſtreſs, I ſuppoſe for ſome reaſon (whether it was neceſſary for him to keep out of the way, ſo that he could not perſonally demand it, does not appear) he executed a letter of attorney to enable another perſon to receive all legacies and other monies due to him. Under this letter of attorney that perſon received the legacy of 200l. bequeathed to the plaintiff by his uncle, and no more, and he gave a receipt for that ſum and for nothing elſe; and no notice was taken of the legacy of 100l. due under the will of *B.* The plaintiff has now reſted for ten years; and, whether from the increaſing diſtreſs of his circumſtances, or for what other reaſon, I do not know; he now brings forward this claim, inſiſting that this legacy of 100l. was never ſatisfied. It certainly was not ſatisfied by the legacy of 200l. That was never accepted as a ſatisfaction. The queſtion then is, whether this court ought to declare the plaintiff ſtill intitled to this legacy ſo neglected to be called for by him, when he

(*q*) *Supra.*

ought to have called for it. *Dagley* v. *Tolferry* was much relied on in *Cooper* v. *Thornton*, which went off upon a different ground; Lord *Thurlow* being of the same opinion with me, that under the will, the payment to the father was good. Upon that occasion I looked much into *Dagley* v. *Tolferry*, which was determined by Sir *John Trevor*, whose decree was upon an appeal, affirmed by Lord *Cowper*, upon this ground, that payments to infants during their minority ought to be discountenanced by this court; that an executor at his own peril makes advances, of which the infant may complain when he comes of age. It certainly was not competent under this trust to the executor, nor could he, if he had applied, have obtained permission from this court, to advance any part of the capital of the legacy in putting the child out in the world; for if it had been such a case, that the court would have authorised the act that was done, I desire to be understood, that it would be considered as properly done; for that principle has been established since *Andrews* v. *Partington*, (3 Bro. CC. 60. 401.) that if an executor does without application, what the court would have approved, he shall not be called to account, and forced to undo that, merely because it was done without application. The uncle who died, put himself so far, *in loco parentis*, that the infant has a right to say he does not know, his uncle did not mean to make him a present of that money. The question is, whether he meant to take it as a satisfaction, to affirm the acts of the uncle; and I am of opinion that what the plaintiff has done, is not complete evidence of his having so assented, and, therefore, though I am dissatisfied with the demand, and think that, if motives of honour and conscience had weighed with the plaintiff, he would not have made it, I cannot hold it satisfied. As to the costs, in *Dagley* v. *Tolferry*, the infant lost the benefit of his legacy: in this case, he gets the benefit of it. Under the circumstances I cannot give interest or costs. Decree that the defendant shall pay the legacy of 100l. with interest from the time of filing the bill at the rate of 4-per cent: but I give no costs on either side."

(r) The decree in this cause, upon a bill for an account against executors, directed the usual reference to the master to enquire what was proper to be allowed for the infants during their minority, and who had maintained them. It appeared upon the master's report, that the fortunes of the children did not amount to more than 300l. each.—Their mother, after their father's death, married one of the executors, who claimed before the master, sums greatly exceeding

(r) Walker v. Wetherell, 6 Ves. Jun. CC. 473.

the intereſt of their reſpective fortunes, for their maintenance, education, and advancement. The maſter having allowed the claim, exceptions were taken to the report by the plaintiffs, the ſurviving children, and the queſtion was, whether the defendants ſhould be allowed payments beyond the intereſt of the legacies? And by the *Maſter of the Rolls*, "This objection on the part of the plaintiffs is rather ungracious; for from the ſums ſtated by the maſter, there is no reaſon to apprehend great waſte or negligence, and there would be more ſolid reaſon for complaint, if he had kept them in that ſituation, in which they muſt have been, if maintained upon the intereſt of their fortune only. But my impreſſion is, that the rule has been never to permit truſtees, of their own authority, to break in upon the capital. I am not aware that the court has ever ſanctioned that conduct in a truſtee. It very rarely has occurred, that the court itſelf has broke in upon the capital for the mere purpoſe of maintenance; though frequently for the purpoſe of putting the child out in life: but as to mere maintenance, I doubt it even upon a petition preſented. It is a great misfortune, if the capital is ſo ſmall, as not to leave a comfortable maintenance and education: but what can the court do? Whatever might be done under particular circumſtances, it is impoſſible to ſanction a truſtee in breaking in upon the capital. There are no particular circumſtances in this inſtance upon the one ſide or the other. It is not ſhewn, that there were expectations of fortune, which made it neceſſary to provide a ſuitable education: the capital might be exhauſted in a few years. On the other hand no particular extravagance upon the part of the executor appears. On the contrary, applications were made to him by ſome of the executors, ſtating that the children could not live upon the intereſt. This claim is, therefore, ungracious: but it is better that an individual ſhould ſuffer a hardſhip, than that a general rule of the court ſhould be broken through in a point which would endanger the intereſts of all children. The report, therefore, muſt be reviewed in that part, which allows the defendant theſe ſums."

It ſeems that if the infant-legatee, when the legacy, or advancements in reſpect of it, are paid into his own hands, upon arriving at 21, on full conſideration and *ſui juris*, aſſent to the payment or advancements, ſuch aſſent will amount to a confirmation, and the payments during minority will be conſidered a ſatisfaction of the whole, or ſo much of the legacy as the caſe may happen (*s*): but the *onus* of making out ſuch ſatisfactory proof of the aſſent, lies upon the executor.

(*s*) Lee *v.* Brown, *ſupra*.

If a legacy were given to *A.* to be divided between *A.* and his family; payment of the whole legacy to *A.* by the executor would be good, although many of *A.*'s children or family might be infants.

(*t*) *A.* bequeathed to *Thomas Cooper* 100l. "to be equally divided between himself and his family," and appointed *Winſtanley* and the defendant executors, and died in 1768. In 1769, *Winſtanley* paid the legacy to *Thomas Cooper*, who, at that time had a wife and ſeven children, ſix of whom were adults, and the ſeventh an infant. The father lived till 1775, when he died, no demand having been made by any of his children, of this legacy. *Henrietta*, the youngeſt child, came of age in 1777. In 1784, ſhe, and the other children, made a demand of this legacy; and in 1789, they filed this bill after the death of *Winſtanley* againſt the defendant, as executrix, for this legacy, inſiſting that the payment to *Thomas Cooper* was not a good payment; and, therefore, that the defendant was liable to pay it over again. And by the *Maſter of the Rolls*, "To this demand, it is contended in anſwer, upon the common rule of preſumption with reſpect to bonds, that it muſt be preſumed, from the length of time, that the legacy has been paid; but I ſhall take no notice of this preſumption, becauſe it being in proof that it was paid to the father; the caſe does not admit a preſumption that it has been again ſatisfied. All the caſes where that preſumption has been admitted, have contained circumſtances from which the preſumption might ariſe; which not being the caſe here, there can be no ſuch preſumption, the only queſtion then is, whether the payment to the father is a ſufficient bar to the demand made by the plaintiffs. It is argued on the part of the plaintiffs, that the payment to the father of legacies given to his children who are not of age, is a bad payment. In early times, it appears from the caſe of *Holloway* v. *Collins*, in the 26th and 27th Car. 2. 1 *Eq. Ca. Abr.* 300, that the payment to the father of a legacy to the child was held good; but ſince the caſe of *Dagley* v. *Tolferry* (*u*), the idea of the court has been, that it is not a good payment, and that even in the caſe of an adult child, it is not good, unleſs done by the conſent of the child, or made ſo by a ſubſequent ratification. In that caſe the rule was laid down, and very harſhly, as the teſtator on his death-bed had given directions, that the legacy ſhould be paid to the father, and there had been mutual accounts between the father and the child, and an acquieſcence for nearly fifteen years. It appears from the *Regiſter*'s Book, that evidence was read, that the legacy was ordered by the teſtator to be paid to the father, but that

(*t*) Cooper *v.* Thornton, 3 Bro. CC. 96. (*u*) *Supra*.

circumſtance can make no difference, as I doubt much whether ſuch evidence ought to be read. It would be a dangerous thing to admit evidence, that a legacy given to one perſon was ordered to be paid to another. From the *Regiſter*'s book of the year 1714, *folio* 414, it appears that the defendant was decreed to pay the plaintiff his legacy with coſts, but no intereſt; and from the book *A.* of the year 1715, *folio* 40, that an appeal being brought before Lord *Cowper*, the decree was affirmed, but as it was thought a hard caſe, the depoſit was divided. I lay the matter out of the caſe that it was directed to be paid to the father, and although it was ſo directed and the money paid, and although the ſon acquieſced a great length of time, it ſhould be ſtill competent to him or his repreſentatives to demand it; becauſe a contrary determination would encourage ſuch payments, and becauſe the ſon muſt acquieſce, or purſue his father: or which is the ſame thing, by bringing his ſuit againſt the executor, occaſion his purſuing the father; and that I take to be the ground on which Sir *John Trevor* and Lord *Cowper* went: and if the legatee did not ſtand in that relation to the perſon to whom the legacy was paid, the bill would be diſmiſſed. The only other caſe is *Philips* v. *Paget* (*x*); it went off upon a compromiſe, ſo that we have no account of it but from Mr. *Atkyn*'s book. There the executor was miſled by the teſtator's directions, to pay the legacies within a given time, which circumſtance ought to have weight in the judgment. Then let us conſider the circumſtances of the preſent caſe, for I do not mean to interfere with the doctrine of *Dagley* v. *Tolferry*, that a payment to the father is bad. The preſent is a ſtronger caſe for the executors, than that of *Philips* v. *Paget*. Here, after ſeveral other legacies, all with the words, I give to, &c. is the following, 'to *Thomas Cowper*, to be divided between himſelf and his family.' It is contended, that notwithſtanding the caſe of *Dagley* v. *Tolferry*, here *Thomas Cowper*'s was to be the hand to receive. I ſhould do the harſheſt thing imaginable to make the executor pay it over again. It is true the teſtator has not inſerted the words, "by him to be divided." If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention *Thomas Cowper?* what did he mean by the word 'himſelf?' That can only be applicable, if *Thomas Cowper* is to divide. Then it is not to him and his *children*, but to his *family*, which is much more extenſive. It is to be paid to him, and he as a truſtee is to divide it. If any of the children had called upon him to have it ſecured, it muſt

(*x*) *Supra.*

have been so. Therefore, if in *Philips* v. *Paget*, the executor was discharged, *à multo màgis* he must be so here. Then it was paid by *Winstanley* in a manner that was wrong, for I must allow it to be wrong, if it was not meant to be paid to *Thomas Cowper*. *Cowper* died in 1775. From that time, the plaintiffs might have called upon the executor, without his being able to pursue the father. In 1777 the youngest came of age: why did not they then file their bill against *Winstanley*, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill, they might have recovered against *Winstanley*: but under the circumstances of the case, I believe it was well paid, and that it was intended that he should receive it. If one was to give a legacy to the senior Six Clerks, to be divided among himself and the other Six Clerks, I think it should be paid to the senior, and the executor not to be put to enquire who the other Six Clerks were. And that if it had been the case of a bequest of goods to *A.* to be divided between himself and family, *A.* with the assent of the executor, might bring trover for the goods." Bill dismissed. Upon an appeal to Lord *Thurlow*, C. from this decree, it was affirmed (*y*).

(*z*) *B.* bequeathed 2000*l.* reduced annuities to *C.*; *C.* to have the interest for life, with remainder to *C*'s. daughter, the testatrix's niece *M. Robinson*, *for her and her children's use*, which she either then had, or might have afterwards. After the date of the will Mrs. *Robinson* had three children. *C.* died in 1801, at which time one child was only living, the others having died soon after their birth. The bill was filed by Mr. and Mrs. *Robinson*, for payment of the dividends accrued and to accrue, and for a transfer of the annuities as should appear to the court to be according to the will. The *Master of the Rolls*, "I think this is like *Cooper* v. *Thornton*. The bequest is to Mrs. *Robinson* in the first place, and if it stopped there it would be absolute to her. But the will goes on to declare an use, which is for her own benefit, and that of the children. I think the plaintiffs must have a decree for a transfer and payment of the dividends accrued."

7. Legacies bequeathed to married women, ought in general to be paid to their husbands; but in cases where the husband has made no provision for his wife, the executors may withhold payment of the legacy until he consent to make a suitable provision, as the Court of Chancery upon a bill filed by the husband for the legacy, would refuse to make such an order, unless the husband consented to a reasonable settlement on the wife. Thus in the following instance among many others;—

(*y*) 3 Bro. CC. 186. (*z*) Robinson v. Tickell, 8 Ves. Jun. CC. 142.

(*a*) *A.* married a young gentlewoman who had a legacy of 400l. left her, payable at her marriage. *A.* demanded the legacy, but the executor refused to pay it, unless some settlement or provision were made for the lady, but on those terms he offered to pay the legacy. *A.* refused to make any settlement, and with his wife brought a bill for recovery of the legacy. The cause being heard at the *Rolls*, it was decreed that the plaintiff should make his proposals to the master, and also pay the costs of the suit, as it appeared that the executor as well before the bill filed, as also by his answer, offered to pay the legacy, upon *A.* consenting to make the settlement on his wife. Upon an appeal from this decree to Lord *King*, C. his lordship thus expressed himself, "I found it to be the practice at my coming into this court, to inforce the husband before he recovers by the aid of equity his wife's portion, to make a settlement; and as such practice has so long obtained, I shall not at this time take upon me to alter it, though it seems to break in upon the legal title, which the husband has to his wife's personal estate; and this method, however, intended originally as a cautionary provision in favour of the wife, has sometimes proved inconvenient, but yet custom and long usage have sufficiently established it; nevertheless I will reverse that part of the decree which orders the plaintiff *A.* to pay costs to the defendant, for I will not condemn a man to pay costs for insisting upon a right which the law gives him; so let there be no costs on either side, but as the plaintiff *A.* now offers to make a settlement upon his wife, that settlement must be made at his own charge."

It seems, that though the wife elope from her husband, and cohabit with another man, if she be unprovided for, the court will not allow her husband to take her property, without making a provision for her. Thus,— 8

(*b*) *A.* under the will of her father, was intitled to the interest of 5000l. 3-per cent. annuities, for her support and maintenance until 21, at which period she was to have the capital transferred to her. While an infant, on the occasion of her marriage with the plaintiff, her fortune was the subject of settlement, but no provision was made for the payment of the dividends to the plaintiff, during the coverture, but only in case he survived his wife; to correct this part of the settlement under the head of omission, and to have the dividends declared to belong to the plaintiff during the marriage, was the principal view of the bill. It appeared that the wife had eloped from her husband, and lived in adultery: but she

(*a*) Brown *v.* Elton, 3 P. Will. 202. (*b*) Ball *v.* Montgomery, 4 Bro. CC. 339.

ſwore, and was ſupported by her mother, that by the agreement prior to the ſettlement, the whole of the dividends were to be paid to her for her ſeparate uſe. Lord *Thurlow*, C. was of opinion that there was no ground to correct the ſettlement, which was intelligible, as without expreſs proviſion, the dividends during the coverture were payable to the huſband, and ſaid, "I can make no diſtinction between this caſe and that of a ſum of money ſo given, that the huſband could not obtain it but by coming to this court, which is the caſe wherever a woman is intitled without an appropriation. The delinquency of the woman is, in this caſe, a reaſon for not giving it to her, and I cannot give the whole to him on account of her intereſt. I muſt ſecure a part for her, or reduce her to beggary. This will lead to an agreement to make a proviſion for her." The coſts muſt be deducted out of the accumulated dividends.

If the wife conſent in court, or if abroad, before proper commiſſioners, for the huſband to receive her legacy, the court will decree it accordingly without requiring any ſettlement, as appears from the following caſes among many others;—

(*c*) The ſum of 1300l. was charged in truſt as a proviſion for a daughter; ſhe married without the conſent of her relations, and it was inſiſted by the truſtee, that the huſband who appeared to be inſolvent, ſhould find ſome method of ſecuring the wife's money as a proviſion for her, but as he had neither real nor perſonal eſtate, he was incapable of doing it: it was therefore propoſed, that it ſhould be referred to a maſter, to conſider of a ſcheme for ſecuring ſome proviſion for the wife, as had been done in caſes of this nature. The wife, however, appearing in court, and being examined, deſired that the whole 1300l. ſhould be paid to her huſband, without expecting any proviſion for herſelf, upon which the *Maſter of the Rolls* refuſed to refer it to a maſter, which he ſaid was never done unleſs circumſtances of fraud appeared, or compulſion on the part of the huſband, and ſaid that a wife might as well diſpoſe of perſonal eſtate, over which ſhe had an abſolute controul, as of real eſtate by joining in a fine with her huſband.

(*d*) A petition was preferred, by *Pearſon* and wife, that 860l. left under a will to perſons in truſt for the wife and her heirs, to be laid out in the purchaſe of lands, might be paid to the huſband inſtead of being inveſted in land, and Lord *Hardwicke*, C. doubted whether he could direct the money to

(*c*) Willats *v.* Cay, 2 Atk. 67. See alſo Milner *v.* Colmer, 2 P. Will. 638. Parſons *v.* Dunne, 2 Veſ. 60. Ellis *v.* Atkinſon, 3 Bro. CC. 565. Campbell *v.* French, 3 Veſ. Jun. CC. 321, SP. (*d*) Pearſon *v.* Brereton, 3 Atk. 71.

be paid to the husband, notwithstanding the wife's consent, because the heir would have a chance, if the wife died before the money was invested in land; but upon the authority of a case at the *Rolls*, his Lordship directed (the wife consenting in court) that the money should be paid to the husband.

(*e*) *B.* bequeathed a sum of money to be divided among the children of *Elizabeth du Bens*. *Charlotte*, one of the daughters being married to *Hardy*, and living abroad at *Breda*, an application had been made that 881l. 6s. 8d. her share, together with 132l. 5s. 1d. interest should be paid to her husband; and it was ordered that she should appear before some of the plaintiffs, and a magistrate of *Breda*, to be privately examined in the *French* or *German* languages, as to her consent, and the examination attested by notaries public, and translated upon oath. This being now done, and a petition presented by her and her husband, that after deduction of costs to be paid to the solicitor, the remainder of the sum should be paid to the husband; Lord *Thurlow*, C. said, that for the future he should expect *an affidavit*, upon such applications, that there was no settlement on the marriage; and it being suggested in the present case, that the settlement was before marriage, affecting only the husband's fortune, and not this money which had come to the wife, and that they had an affidavit to that effect, the payment was ordered.

(*f*) This was a petition by the husband to have part of his wife's fortune, which was in court, paid to him, it appeared that the husband was a glover by trade, and had six children by his wife; the wife was in court and consented: and although this application was strongly opposed by the trustees in the marriage settlement, yet the wife persisting, after a long examination, in her consent, Lord *Thurlow*, after taking till the next morning to consider of it, made the order.

Those cases, however, must be excepted, where it appears from the manner in which the legacy or money is given, that it was not intended that the wife should have the power to make an *immediate*, absolute, and irrevocable disposition of it. Thus, if a legacy were given to a married woman for her separate use for life, with a general power of appointment by *will*, and in default of appointment to her executors, it seems, that according to the present law of the court, they would not order payment of the principal to the husband, although the wife consented, because the testator's intention would be clear, that she should not enjoy an absolute irrevocable power

(*e*) Minet *v.* Hyde, 2 Bro. CC. 663. (*f*) Dimmoch *v.* Atkinson, 3 Bro. CC. 195.

of diſpoſition, but a power of diſpoſition by a *revocable* act only *viz.* by will.

(g) By ſettlement made upon the marriage of the plaintiffs, to which they were parties, reciting that the defendant *Wray* had inveſted 1000l. in the names of himſelf and *Morgan* in the purchaſe of 1234l. 2s. 1d. 3-per cent. conſols, it was witneſſed that in order to declare the truſts thereof, *Wray* and *Morgan*, with the expreſs privity, conſent, and direction, or appointment of the plaintiff *Sockett*, covenanted to ſtand poſſeſſed of the ſtock and intereſt upon truſt, that they ſhould from time to time during the life of the plaintiff *Catherine Sockett*, pay over the dividends into the proper hands of the plaintiff, *Catherine*, and for her ſole, abſolute, peculiar and ſeparate uſe and benefit, or to ſuch perſon or perſons as ſhe by any note or notes, inſtrument or inſtruments, writing or writings, to be by her ſigned, notwithſtanding her *preſent coverture*; ſhould direct or appoint; and it was agreed and declared that the plaintiff *Henry Sockett* ſhould not intermeddle therewith, nor ſhould the ſame be ſubject or liable to his controul, debts, or engagements, and that the receipt and receipts of *Catherine* ſigned by her proper hand, or of ſuch perſon or perſons as ſhe ſhould in manner aforeſaid appoint to receive the ſame, ſhould *from time to time*, notwithſtanding her coverture, be a good and ſufficient diſcharge for the ſaid dividends, &c.; and after the deceaſe of *Catherine*, upon truſt, that the truſtees, &c. ſhould transfer the 1234l. 2s. 1d. unto ſuch perſon or perſons, at ſuch time and times, in ſuch parts, ſhares, and proportions, and in ſuch ſort, manner and form, and ſubject to, with and under ſuch powers, proviſoes, conditions, reſtrictions and limitations as *Catherine* by herſelf alone, whether ſole or covert, and notwithſtanding her preſent coverture, ſhould *at any time or times* during the term of her natural life by her laſt will and teſtament in writing, or any writing purporting to be her laſt will and teſtament, to be by her ſigned and publiſhed in the preſence of, and atteſted by, two or more credible witneſſes, ſhould *give, bequeath, direct or appoint*; and for want of, and in caſe no ſuch gift, &c. ſhould be made thereof, or not extending to the whole of *Catherine*'s eſtate or intereſt therein, then as to ſo much thereof as ſhould not be ſo given, &c. in truſt, to transfer the ſame to the *executors or adminiſtrators* of *Catherine*, *for their own uſe and benefit*. Since the execution of the ſettlement, the intereſt was regularly paid to the plaintiff *Catherine*, according to the terms thereof; and the plaintiffs having occaſion for a ſum of money, and *Catherine* being deſirous of having the Bank Annuities ſold, and the money

(g) Sockett *v.* Wray, 4 Bro. CC. 483.

paid to the plaintiffs, applied to the truſtees to ſell the ſame, being ready to acquit and diſcharge them from all future claims, but the defendant refuſed without an indemnity, on which account the bill was filed, inſiſting that the plaintiff *Catherine* being intitled to the dividends for life, to her ſole and ſeparate uſe, and to diſpoſe of the capital in ſuch manner as ſhe ſhould think fit, the truſtees could not be prejudiced by transferring the ſame; and praying that the defendants, the truſtees, might be decreed to ſell the funds, and to pay the money to *Henry Sockett*, the plaintiff *Catherine* being willing to appear in court and conſent to the ſame. And by the *Maſter of the Rolls*, "The effect of the deed is this, in conſequence of an agreement before marriage, the money is put into the hands of truſtees, to pay the dividends to the wife, or as ſhe ſhall appoint, for life, and after her deceaſe according to her appointment, *by will*, and the queſtion is, whether under ſuch a truſt it is competent to the wife to waive the benefit of the deed, and to give the whole capital away at once, during her life. At the opening, it ſtruck me that it was impoſſible to be done; a caſe in point was then cited. But notwithſtanding that caſe and the reſpect I have for the noble Lord who decided it, I cannot conform to it. The caſe is *Newman* v. *Cartoney*, which came on 24th *April*, 1771, and is in the Regiſter's book for 1770, *B.* 275. It came on by conſent, and therefore is likely to have been acquieſced in, but it is my duty to exerciſe my own judgment on the ſubject. The other caſes that were cited were *Hulme* v. *Tenant*, (1 Bro. CC. 16.) *Pybus* v. *Smith*, (3 Bro. CC. 340) and *Ellis* v. *Atkinſon* (ibid. 565). In the caſe of *Hulme* v. *Tenant* it appears that Lord *Bathurſt* was of a different opinion from Lord *Thurlow*. From that caſe I extract this principle, that a married woman in this court may be conſidered, as to *all her property*, as a feme ſole, I ſay as to her property, becauſe no contract can be entered into by her to affect her *perſon*, the remedy muſt be againſt her *property*, with reſpect to her perſon ſhe is protected. Lord *Thurlow* ſays there, that the court cannot exerciſe any power as to her perſon, but if ſhe affects to enter into any contract, which would make her perſon liable, if ſhe were a feme-ſole, it ſhall operate upon her property in the hands of her truſtees: Lord *Bathurſt* in that caſe diſmiſſed the bill, but Lord *Thurlow* thought the plaintiff might make the contract available againſt the property of the wife, and I am very much inclined to hold, that where a power is given to a married woman, to act on her property, ſhe is ſo far to be conſidered as a *feme-ſole*. *Norton* v. *Turvill*, 2 P. Will. 144, bears much more analogy to the preſent caſe than *Hulme* v. *Tenant*. *Ellis* v. *Atkinſon* was prior in time to *Pybus* v. *Smith*. In *Ellis* v. *Atkinſon* Lord *Thurlow* had

great difficulty in getting over the words *from time to time*. In *Pybus* v. *Smith* Lord *Thurlow* expreſsly laid it down that if it was the intention of a parent to give a proviſion to a child in ſuch a way, that ſhe could not alienate it, he might do ſo, but he thought the intention muſt be in expreſs terms. If of a parent, it muſt be ſo of any other perſon giving property. But if the parent or other perſon has given a power without reſtraining it, the court will act upon the property. Then what is the meaning of the power under this deed? The meaning is this, that the wife ſhould have the whole intereſt for life, with a power to diſpoſe of the whole, ſo as ſhe did that by a revocable act; but ſhe muſt reſerve a power to act upon the property in future, if ſhe thought fit ſo to do. A married woman is in a different ſtate from an *infant*, an infant has no diſpoſing mind: with reſpect to a married woman, the law ſays, ſhe has a diſpoſing mind but not a diſpoſing power. This court gives her a diſpoſing power, if the power in the ſettlement limits it ſo. In this caſe ſhe is to do it "by any note or notes, inſtrument or inſtruments, writing or writings," this omiſſion of the words 'deed or deeds,' which are uſually inſerted in ſuch powers is a ſtrong guard, and ſhews ſhe was only to do it by a revocable act, and has no right to give but under the power. It is admitted, that if the gift in default of appointment, was to perſons expreſsly named, ſhe could not diſpoſe of the whole at once, but it is argued to be different when it is given to her executors or adminiſtrators. In *Norton* v. *Turvill* the diſpoſing power was not confined to being executed by a will. The queſtion there was, as to the execution by bond. The *Maſter of the Rolls* was of opinion, that though as a bond it was void, it was a good diſpoſition againſt perſons claiming under her will, and that where a perſon having a diſpoſing power, gives a bond, it is binding on her perſonal property. It is argued that ſuppoſing her a feme-ſole, ſhe could do the act; there the ſingle woman can act, becauſe ſhe can bind herſelf perſonally, but is there any contract that this married woman could enter into, that would bind her after the termination of the coverture? If ſhe gave a bond could ſhe be ſued upon it after the coverture? Certainly not. A man, or a ſingle woman, as they can bind themſelves perſonally, may bind their executors and adminiſtrators, but it is not ſo of a married woman. As to the intereſt, ſhe was to have it for life, but as to the principal ſhe could only diſpoſe of it *from time to time* by a *revocable* act. I ſhould go too far in this caſe, if I held it to be diſpoſable any way but by will. I ſubſcribe to *Norton* v. *Turvill*, but this is a different caſe, therefore notwithſtanding the caſes of *Newman* v. *Cartoney*, *Ellis* v. *Atkinſon*, and *Pybus* v. *Smith*, I think ſhe

could not diſpoſe of it by deed. There is ſomething remarkable in this caſe, that the reſtraint is only during her *preſent* coverture. If ſhe ſurvived her preſent huſband, the reſtriction was thought unneceſſary, therefore during the life of her preſent huſband, ſhe can only diſpoſe of it by will." Bill diſmiſſed.

When the feme-legatee is the ſubject of a *foreign* ſtate, by the law of which the huſband would be intitled to receive the whole of his wife's property, without making any proviſion for her, the Court of Chancery will diſpenſe with the wife's conſent in ſuch caſes, and decree the legacy to her huſband. Lord *Loughborough* in *Campbell* v. *French* (*h*), alluding to the wife's conſent, thus expreſſed himſelf; "No doubt I could ſend a commiſſion abroad: but it depends a little upon the law of the country where the party reſides, whether it might not be paid to the huſband; I think there was before Lord *Thurlow*, a caſe of a legacy to a married woman in the *Pruſſian* dominions, and being a *Pruſſian* ſubject; and it being ſtated, that by the law of *Pruſſia*, when the money got there, it would belong to the huſband, the money was paid to him." 11

The equity of the wife to oblige her huſband to make a ſuitable proviſion for herſelf and children, in conſideration of her fortune, in caſes where he cannot obtain the whole, or part of it without the aſſiſtance of a court of equity, is obligatory upon all perſons claiming generally from or under him, as *executors*, aſſignees of bankrupts, or general aſſignees by deed, in truſt to pay debts, ſo that if the huſband become a bankrupt, or aſſign his property to truſtees for the benefit of his creditors, including in it the intereſt of the wife, and the aſſignees or truſtees apply to the court, for the wife's eſtate, they will be obliged to make proviſion for her and family, before they be permitted to receive it, becauſe the aſſignees and truſtees are to be conſidered as ſtanding in the huſband's place, and ſubject to all ſuch equitable demands as he was liable.—Accordingly, 12

(*i*) *Sarah* and *Elizabeth Walker*, the only children of *W.* and *M. Walker*, were intitled under a truſt in the marriage-ſettlement of their father, to pay out of the rents and profits of certain premiſes 40l. a year, or to convey two third parts of the premiſes to the children of the marriage as tenants in common. *W. Walker* by his will gave 1000l. in truſt for the marriage portion of *Sarah*, if ſhe married with the approbation

(*h*) 3 Veſ. Jun. CC. 323. (*i*) Burdon *v.* Dean, 2 Veſ. Jun. CC. 607. See alſo Worral *v.* Marlar, and Buſhnan *v.* Pells, 1 P. Will. 459. Ed. by Cox, in notes. Oſwell *v.* Probert, 2 Veſ. Jun. CC. 680. Brown *v.* Clark, and Freeman *v.* Parſley, 3 Veſ. Jun. CC. 166—421. S P. alſo Jewſon *v.* Mouſon, *infrà*.

of the truſtees. He alſo gave, after the death or marriage of his widow, all his freehold eſtates in moieties, to the uſe of his daughters for life, remainder to truſtees to preſerve contingent remainders, remainder to their children equally in tail, with croſs remainders, remainder to his own right heirs; and all his leaſehold with the reſidue of his perſonal eſtate, he gave to truſtees in truſt as to one moiety to pay the rents and intereſt to *Sarah* for life, and after her death, in truſt for her children equally; and as to the other moiety in truſt for *Elizabeth* and her children in the ſame manner; and in caſe either of them ſhould leave no children, in truſt for the other and her children in the ſame manner, with remainder to the ſurvivor of his two daughters, her executors and adminiſtrators. In 1771 *Sarah* married *W. Blaſtock*, and by the ſettlement previous to the marriage, to which the truſtees of the 1000l. were parties, it was agreed that in conſideration of the marriage, and of 500l. part of that ſum paid to *W. Blaſtock*, the remaining 500l. ſhould remain in the hands of the truſtees, to be placed out upon ſecurities with the approbation of the huſband and wife, upon truſt to permit the intereſt to be received by the wife for her ſeparate uſe, not ſubject to the debts, power, controul, or engagements of her huſband; and after her death upon truſt for, and as the portions of the children equally, if more than one. No notice was taken of the other property of *Sarah*. The teſtator's widow died in 1772; from which time *W. Blaſtock*, and *R. Eaton*, the huſband of *Elizabeth*, received the rents, dividends, and intereſt of all the eſtates and property under the will and ſettlement of *W. Walker*, amounting to 500l. a year. In 1794, *W. Blaſtock* was declared a bankrupt, and his aſſignees filed the bill, praying to be declared intitled during the joint lives of the bankrupt and his wife, to the income of a moiety of the teſtator's freehold, leaſehold and perſonal eſtate, and to ſuch eſtate and intereſt as the bankrupt was intitled to in right of his wife, as tenant by the curtſey, or otherwiſe under her father's ſettlement, and the income thereof, and an account of the arrears. The bankrupt and his wife ſtated by their anſwer, that they had nine children, four of whom were living, and claimed ſome further proviſion for the wife. And by the *Maſter of the Rolls*, "It is impoſſible to give the wife the whole, for that would be to admit, that a married woman is intitled to the whole of her property to her ſeparate uſe. Courts of equity have gone thus far; as to all the perſonal property of the wife, which the huſband is not authoriſed by law to reduce into poſſeſſion, but muſt come here for, he muſt either ſhew himſelf a purchaſer or make ſome proviſion for her out of it, otherwiſe the court will not give it to him: I do not know that they will

give it to the wife. I doubt whether that has been extended to a truſt of real eſtate to which the wife is intitled for life. The next queſtion is, whether the wife having, when *ſui juris*, and before marriage, made a ſtipulation to ſecure what ſhe thought fit for a certain portion, has ever been permitted to come here and require more. I admit a new equity ariſes upon property newly acquired." His Honour having declined pronouncing his final opinion at that time, afterwards proceeded to this effect, "I am of opinion the ſettlement has not barred the wife. The next queſtion is, whether the plaintiffs can get any thing, without the intervention of this court. All the queſtions have been as to ſpecific aſſignees for valuable conſideration: the plaintiffs are not in that caſe. I have no objection to what they can get at law: but if they come into this court, I will not extend its arm to give them any other part of her property without a conſideration for it. Therefore let it be referred to the maſter, that they may lay propoſals before him."

(*k*) *B.* bequeathed to his wife *Mary Barber* 1750l. in truſt to place at intereſt, and to pay the ſame to his niece *Sarah Taylor* for life, and after her death he gave the principal to her children equally, but if ſhe died without leaving any child or children, then he gave the intereſt to the defendant *Catherine Maſon* for life, and after her death the principal to her children in equal ſhares. The teſtator alſo gave to his wife another ſum of 1750l. in truſt to place at intereſt, and pay the ſame to *Catherine Maſon* for life, and after her death the principal to her children equally, and appointed his wife executrix. The teſtator's widow inveſted the two ſums of 1750l. in the purchaſe of 3-per cent. conſols. *Sarah Taylor* died in the life of the teſtator without iſſue. The widow intermarried with the defendant *Hill*. The defendant *Maſon*, the huſband of *Catherine*, being indebted to the plaintiffs and other perſons, made a general aſſignment to the plaintiffs of his ſtock in trade, debts, and other effects whatſoever, in truſt for themſelves and the reſt of his creditors. The plaintiffs filed the bill againſt *Hill* and wife, and *William* and *Catherine Maſon*, praying payment of the dividends upon theſe two ſums, until they ſhould have received their full demands. Queſtion, whether the aſſignees were intitled to the dividends without making a proviſion for *Catherine* for life, ſhe having children by *William*, who after her death would be intitled to the principal. And the *Maſter of the Rolls*, "This is a general aſſignment by *W. Maſon* of all his effects to the plaintiffs in truſt for his creditors, and it comes to this, whether the aſſignees are intitled to the intereſt of the funds for the life of the wife. The

(*k*) Pryor *v.* Hill, 4 Bro. CC. 139.

assignment in this case being equivalent to an assignment in law by bankruptcy, I cannot see why the court should not admit the same equity of calling on the assignees to make a provision for her. The assignees are not intitled to the annuity without making such provision, 1 *Atk.* 192. If the parties cannot agree, I can only say I cannot assist the assignees to get it, without their making a provision." His Honour therefore referred it to the master, in order that the assignees might make an offer.

13 Whether *assignees for a valuable consideration* from the husband, are liable to this equity of the wife, has been a question of considerable doubt, and great men have entertained contrary opinions upon the subject: it seems however to be the better opinion, that such assignees or assignee will not be allowed to take the wife's equitable property, without making a provision for her, as a contrary adjudication would enable the husband at all times to defeat the care and caution of the court, by taking up money of a third person, and assigning the portion of the wife in payment.

(l) *A.* having five children, by will directed two freehold houses to be sold, and his whole estate to be turned into money, and after his debts and legacies paid, he gave the residue of the money to the plaintiff and others, his executors in trust for the benefit of his four sons, and his daughter *Jenny*, to be divided equally between them, and if any or either of them died before 21, their shares were to go to the survivor. One of the sons died after the father and under 21, so that his share went over to the survivors. In 1739, Mr. *Vobe*, who kept a tavern, married the daughter, but made no provision for her by settlement. In 1740, Mr. *Vobe* being indebted to the defendant *Moulson* gave a bond for the payment of it, and about three weeks after made an assignment to *Moulson* of all the share which in right of his wife he was intitled to in her father's personal estate. He afterwards made a second assignment of his wife's share to trustees for the benefit of all his creditors. During these transactions the wife of *Vobe*, and daughter of the testator was under age. The executors had done no act to settle or make any division of the testator's personal estate. Mrs. *Vobe* had two children to maintain as her husband was a bankrupt. Her share under the will amounted to about 600l. and *Moulson*'s debt to above 500l. The question was, whether the wife, who was totally unprovided for, should have a maintenance secured to her, out of her share of her father's personal estate, before it was applied in payment of *Moulson*, and the other creditors of the husband? And by Lord

(l) Jewson *v.* Moulson, 2 Atk. 417. See also the Earl of Salisbury *v.* Newton, stated by the Master of the Rolls, in Franco *v.* Franco, 4 Ves. Jun. CC. 529. also Davies *v.* Austen, *supra*.

Hardwicke, C. " Here are two bills brought, the firſt by the executors to be diſcharged of their truſt upon paying and aſſigning over *Jenny Vobe's* ſhare of her father's perſonal eſtate, and that they may be indemnified in ſo doing. The ſecond bill is brought by Mr. *Moulſon* who claims a right to *Jenny Vobe's* ſhare in the above eſtate, under the aſſignment from her huſband. As againſt the huſband the equity is extremely plain, and likewiſe againſt the aſſignees, who claim under the ſecond aſſignment. Therefore the principal queſtion in the cauſe ariſes out of the defence made by the wife of *Vobe*. Two points have been inſiſted on for her, that the huſband cannot come into this court, for the fortune of the wife, without making a proviſion for her in the firſt place. Secondly, that there is an equity attached to the thing itſelf, and therefore the aſſignee of the huſband takes it ſubject to the ſame equity, and from hence ariſes the greateſt doubt. As to the *firſt*;—It is an equity grounded upon natural juſtice, and is that kind of parental care which this court exerciſes for the benefit of orphans, and as the father would not have married his daughter without inſiſting upon ſome proviſion, ſo this court who ſtands in *loco parentis* will not do it. This court will not ſuffer the huſband to take the wife's portion (though the eccleſiaſtical court who have a concurrent juriſdiction with this, in regard to portions ariſing out of perſonal eſtate, have given their conſent that the huſband ſhould have it,) until he has agreed to make a reaſonable proviſion for the wife, and in many inſtances have granted injunctions to ſtay the proceedings in the eccleſiaſtical court. In *Tothill's* tranſactions in the High Court of Chancery, in the caſe of *Tanfield* v. *Davenport*, 14 *Car.* 1. Lord Keeper *Coventry* takes notice of this rule, which ſhews it is not a doctrine newly taken up, as has been ſuppoſed. But though this is ſo, yet if the huſband can come at the chattels of the wife without the aid of this court, or of a court having a concurrent juriſdiction, I do not know any inſtance where this court has interfered; as if the wife's debtor will pay her debt to the huſband; ſo likewiſe where there is a bond debt to the wife *dum ſola* and the huſband recovers it at law, I do not know that this court has ever granted an injunction, for his ſuing at law was very proper, and therefore this court leaves it to its natural courſe, without meddling with a legal queſtion; though if a bill was brought in favour of a wife, for an injunction to ſtay execution upon the judgment at law, I do not know whether this court would not grant it; but as that point is not now before me, I will not determine it. If one looks into the caſes upon this head, it is difficult to reconcile them, though indeed one thing is clear through them all, that if the huſband make a voluntary aſſignment of the wife's portion, the volunteer **muſt ſtand in the place of the**

husband; there is the same equity too in regard to *executors* and administrators, and the same as to *assignees of bankrupts*, for it is the law that casts it upon them, 2 Vern. 401, 564, *Taylor* v. *Wheeler*, and *Jacobson* v. *Williams*, 1 P. Will. 382. There is a particular train in the report of this last case, and it looks as if Lord *Cowper* rested his opinion chiefly upon the commissioners of bankrupts assigning a possibility, which he thought they could not do, but he was certainly wrong in point of law, for that not only the latter statutes relating to bankrupts, mention the word *possibility*, but also because the 13 Eliz. cap. 7. sect. 2. empowers the commissioners to assign all that the bankrupt *might depart with*; and besides the 21 Jac. 1. c. 19. enacts that the statute relating to bankrupts shall be construed in the most beneficial manner for creditors. Vide *Higden* v. *Williamson* at the *Rolls*, *Mich.* 1731. and affirmed by Lord Chancellor *King*, in *Mich.* 1732: and in equity it is very well known that a possibility may be both released and assigned. The next case is *Watson* v. *Maschal*, March 19, 1732, before Sir *Joseph Jekyll*, who decreed exactly upon the same reasoning as in *Jacobson* v. *Williams*. Yet, where the wife's *trust of a term* has been assigned by the husband for a valuable consideration, there the determination has been contrary, and the rule has been, that the assignee should not make a provision for the wife before he could be intitled. *Tudor* v. *Smayne*, 2 Vern. 270. There was some dispute at the bar, how *non allocatur* at the end of this case is to be applied, whether to the whole case, or to the words immediately preceding; but from what I have mentioned before out of *Tothill*, it is applicable only to the last preceding words. The next cases are, *Walters* v. *Sanders*, Eq. Ca. Ab. 58. *Bosvil* v. *Brander*, 1 P. Will. 458, and *Bates* v. *Dandy*, 2 Atk. 207. In these cases you observe the *particular* contract of the husband for a valuable consideration, has got the better of the wife's equity to have a provision. The ground of Sir *Edward Turner*'s case, 1 Vern. 7. was this, that as the husband at law could dispose of a term for years, so may he dispose of the *trust* of a term, because the same rule of property must prevail in equity as at law: but see the case of *Pitt* v. *Hunt*, 1 Vern. 18. where Lord *Nottingham* expressed great surprise at this resolution. Now I apply the reason of these cases to the present. As to the last of the assignments, it does not differ from the case of assignments of bankrupts, for it is the case of a failing man, and exactly under the same reasoning, as an assignment of a bankrupt's effects for his creditors in general; for here he assigns all his right, title, &c. and therefore is exactly upon the same footing. As to the first assignment to the defendant *Moulson*, to be sure that is different from the other, and likewise differs in several

circumſtances from all the caſes cited. In the firſt place here is a mixed fund ariſing out of real as well as perſonal eſtate; for though the father, indeed, by his will directs the eſtate to be ſold and turned into money, yet all the children together, when of age, might have ſaid to the truſtees of the will, let us take the real eſtate as it is, notwithſtanding the teſtator has directed it to be ſold: beſides the wife was an infant when ſhe married, and likewiſe during all theſe tranſactions, and conſequently a particular object of the care of this court. Beſides too, this is not an aſſignment of a term for years, or a ſpecific thing, but an aſſignment at once of *all her fortune*, and which the huſband could not reduce into poſſeſſion without the aſſiſtance of this court, neither has there been any diviſion made, or even an account taken of the teſtator's eſtate which could bind the parties. The truſtees themſelves, though willing to have joined with the huſband, could not have bound the wife as ſhe was an infant, and as there is likewiſe a clauſe of ſurvivorſhip in the will, and therefore there is no poſſibility of coming at the fortune without the aid of this court. For this reaſon Mr. *Moulſon*, muſt be preſumed to have known all the circumſtances of this ſecurity, and what the rule of equity is in regard to proviſions to be made for a wife out of her fortune. In the preſent caſe I lay very great weight upon its being an aſſignment of the *whole* portion, and if I ſhould allow this practice to prevail, it would trip up all the care and caution of this court with regard to infants; for a huſband then would have nothing to do but to take up money of a third perſon; and though neither he nor the lender know exactly at the time what the fortune is, yet he may aſſign it over, and ſo defeat the care of the court entirely. Conſider too the particular circumſtances of this caſe; the huſband was in debt before he married; runs away with this young woman clandeſtinely, without the conſent of any of her relations, with a view, very poſſibly, to prevent his being arreſted. To this it may be objected, that if I decree a proviſion for the wife, people will not venture to lend their money, which would be a great detriment to the public in general, and to trade in particular. To which I anſwer, that though this court ſhould not ratify and legitimate ſuch aſſignments, yet there will be perſons enough found to riſque their money upon ſuch ſecurities. Therefore, I am of opinion not to allow the creditor to receive the whole fortune of the wife, without making ſome proviſion for her; and I would recommend this method to the defendant *Moulſon*, that he ſhould come into terms to give the wife and children ſome part of the principal of her fortune, and then he will have an immediate benefit from the

reſidue". Lord *Hardwicke* ordered it to ſtand till the firſt day of cauſes after the term; and ſaid, perhaps, before that time, the parties, when they ſaw the inclinations of the court, would acquieſce; if they did not, they could have no benefit for a long time, as the intereſt of her fortune could be applied only to the ſeveral demands. When the caſe ſtood again in the paper, it appeared that it was agreed between the parties, that the neat ſum, which remained after the deduction of the coſts, ſhould be divided into equal moieties; and one moiety paid by *Jewſon* to *Moulſon*, towards ſatisfaction of his debt; and the remaining moiety retained by *Jewſon*, to be diſpoſed of for the ſeparate uſe and proviſion of *Jenny Vobe*, and the children ſhe then had or might have, in ſuch manner as the court ſhould direct: upon which Lord *Hardwicke* decreed the agreement to be performed, and gave directions for placing out and ſecuring *Jenny Vobe*'s moiety for her ſeparate uſe for life, and after her death, for the payment of it to her children, in equal ſhares.

In *Like* v. *Beresford* (*m*) the huſband having eloped with and married a ward of the Court of Chancery, both the principal and intereſt of the wife's fortune were directed to be ſettled upon her for her ſole and ſeparate uſe, during the joint lives of herſelf and huſband, with a contingent intereſt in his favour upon the event of the wife's death during his life and without iſſue, and without making any appointment of her property: this ſettlement was directed and inforced againſt the aſſignees of the wife's fortune, though for *valuable* conſideration. With relation to the general equity of the wife, the *Maſter of the Rolls* expreſſed himſelf to the following effect, "What is the equity of which we have heard ſo much. It is not to be denied that great judges, Lords *Hardwicke* and *Thurlow*, have intimated difficulties, whether an aſſignment for valuable conſideration might not ſupport the right of the aſſignee, or at leaſt evade this equity. I have looked into almoſt every caſe; and have never ſeen it determined, that any ſuch equity does exiſt in favour of the aſſignee. It is certain, that the court has avoided deciding the contrary; and in *Worral* v. *Marlar*, and *Buſhnan* v. *Pell*, in the note 1 P. Wms. 459, by Mr. *Cox*, Lord *Thurlow* does hold that doctrine; but does not ſay, that it was ever ſo decided. Mr. *Cox*, has alſo ſubjoined *Maſon* v. *Wenman*, before Lord *Northington*, in 1765; who follows Lord *Hardwicke* in *Jewſon* v. *Moulſon*, in holding, that an aſſignment even for valuable conſideration of the property of the wife ſhall not be available in equity to defraud the wife and children of the ſettlement to be made

(*m*) 3 Veſ. Jun. CC. 506—511.

by the husband, before he can have any part of it. The words in *Atkins* give a reason, that is convincing; that it would put an end to the equity of the wife. Lord *Hardwicke* and Lord *Northington* have therefore given decided opinions, that an assignment of all the fortune even for *valuable* consideration will not avail against the wife's equity." And—

In *Macaulay* v. *Philips* (*n*), The *Master of the Rolls* expressed his opinion in direct terms in favour of the wife's equity as against an assignee of her legacy or portion for a valuable consideration,—"Many cases upon this point have been before me, which have put me under the necessity of considering very much the right of the wife, and I am clearly of opinion, the doubt respecting the assignment of the husband for valuable consideration of the wife's equitable interest was not well founded, with the single exception perhaps of a *trust of a term for years* of land (*o*), upon which perhaps there may be some doubt: but subject to that, I am clearly of opinion, an assignment for valuable consideration, will not bar the equity of the wife, and it would be strange if it did, since the determinations in the courts of law with regard to an action brought against executors by the husband for a legacy due to his wife. It is determined that the action does not lie, and the reason given is, that it would totally defeat the wife's equity: it would be whimsical then, that the assignment by the husband for valuable consideration, should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this court upon the wife's interest would be very singular, if the husband not being intitled at law might assign it for valuable consideration to another person, who would be intitled in equity. I am clearly of opinion, it was only a *doubt*, and it never was decided, that the husband could by such assignment or any other means deprive her of her equity."

It has been decided, that the equity of the wife to compel the husband to make a settlement is merely *personal*. Accordingly if the wife be intitled to an equitable interest, and dies, leaving a husband and children, the latter being unprovided for by settlement, and the husband files a bill to recover such interest, the children cannot oblige him to make a provision for them out of it. 14

(*p*) The wife was intitled to a sum of money, and died in the life of her husband, leaving children. Upon an appeal from a decree at the *Rolls*, the question was, whether the husband was intitled to the money without making a settlement upon

(*n*) 4 Ves. Jun. CC. 19. (*o*) Jewson *v.* Moulson, *supra*. (*p*) Scriven *v.* Tapley, Ambl. 509.

the children? And by the Lord *Chancellor*, "The compelling ſettlements at firſt aroſe from the huſband coming here for aſſiſtance. It is *perſonal* to the woman. If carried further it would be attended with ill conſequences to creditors. There is no caſe where this court refuſed aſſiſtance to the huſband after the death of the wife, without obliging him to make proviſion for children. Reverſe the decree as to that part."

It has been the language of ſeveral caſes that a court of equity will not interfere at the inſtance of the wife, and direct the huſband to make proviſion for her and her children, as if this equitable juriſdiction were confined to inſtances merely, where the huſband was under the neceſſity of applying to the court for aſſiſtance to enable him to recover the *choſes in action* of his wife. It has been decided however that a court of equity will entertain a ſuit by a married woman and her next friend, for the purpoſe of obliging the huſband to make a reaſonable ſettlement out of ſuch property upon herſelf and children, when the ſubject is not of *legal* but of *equitable* cognizance only.

(*q*) Lady *Elibank* being intitled to conſiderable perſonal property as one of the next of kin of Lady *C.* filed a bill againſt her huſband and *L. Montolieu*, the adminiſtrator of Lady *C.* who was alſo a brother and one of the next of kin of Lady *C.* praying an account of the plaintiff's ſhare, and that it might be ſettled upon herſelf and children. *L. Montolieu* by his anſwer inſiſted upon retaining the plaintiff's ſhare towards ſatisfaction of a debt owing him from her huſband, upon the ground of a proviſion made for her by a prior ſettlement, but which was not adequate to her fortune, and appeared to have been made upon the expectation, that by circumſtances to occur in the family there would be an opportunity to do better for her at a future period. The queſtion was, whether the plaintiff was intitled to the relief prayed by her bill as againſt *L. Montolieu* under the circumſtances ſtated? And the court decreed in the affirmative. Lord *Loughborough*, C. having delivered his opinion to the following effect; "The only difficulty which I had in this cauſe, was upon the form of the ſuit, whether a married woman by her next friend, could be the plaintiff in this court. With reſpect to the point made by the anſwer of *Montolieu*, that he had a right to retain againſt the debt of the huſband, being poſſeſſed of the fund as adminiſtrator, and the wife being one of the next of kin; I am very clearly of opinion that the defendant had no ſuch right to retain. The adminiſtrator is truſtee for the next of kin: the plaintiff being one of them, if ſhe has any equity againſt her huſband with regard to this money, that equity will clearly

(*q*) Lady Elibank *v.* Montolieu, 5 Veſ. Jun. CC. 737.

bar any right of retainer he can ſet up to the property of which he became adminiſtrator. With reſpect to the only difficulty I had upon the point of form, if ſhe be intitled, and there is no way of aſſerting her right againſt her huſband except by bill, that objection I think does not weigh much. If the defendant *Montolieu* had done what would have been the natural thing, and the right thing, and what he cetainly would have done, but for his own intereſt, he would have been the plaintiff, deſiring the court to diſpoſe of the fund, and for her benefit, to protect her intereſt in it. Then upon all the circumſtances it is very clear, if it had come before the court, it would have been matter of courſe to have pronounced upon her equity on the bill of the adminiſtrator, praying that the money in his hands might be properly diſpoſed of, and I would not have ſuffered this money to be paid to Lord *Elibank* without making a proviſion for her; for the proviſion upon her marriage was clearly not adequate to her fortune, and it is clear, that proviſion was made upon the expectation, that by circumſtances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unuſual *in point of form*, the bill being filed by the wife inſtead of the huſband."

Courts of equity have eſtabliſhed the following diſtinction between legatees and their repreſentatives in relation to the time of paying the legacies, viz. that if a legacy be given to *A.* payable at 21, and *A.* dies before that period, his repreſentative muſt wait for the legacy, until *A.* if living, would have attained 21: but if the legacy be limited over to *B.* upon the event of *A.* dying under 21, and *A.* dies before that time, *B.* immediately upon *A.*'s death will be intitled to call for payment of the legacy: the reaſons are theſe; the repreſentative of *A.* can claim no otherwiſe than *A.* himſelf could have done, if living, therefore as *A.* had no power to call for his legacy before he attained 21, neither can his repreſentative inſiſt upon payment of it ſooner: but in the other caſe, *B.* the legatee over does not derive his title through *A.* but under the teſtator's will, by a diſtinct and ſubſtantive gift, upon the contingency of *A.* dying under 21, ſo that whenever that event happens, the time of payment not being otherwiſe poſtponed, *B.* becomes immediately intitled to receive the legacy. To illuſtrate theſe obſervations;

(*r*) *A.* bequeathed to *J. S.* a ſum of money payable at 21, and in the mean time he gave him the yearly ſum of —— which did not amount to the intereſt of the legacy. *J. S.*

(*r*) Cheſter *v.* Painter, 2 P. Will. 336. Alſo Cricket *v.* Dolby, 3 Veſ. Jun. CC. 15. ſtated *infrà*.

died under 21, and his executors demanded immediate payment of the legacy; but it was decreed that the executors of the legatee ſhould wait for the legacy, until ſuch time as their teſtator, in caſe he had lived, would have attained twenty-one, it being unreaſonable that the executors of *J. S.* ſtanding in his place, ſhould be in a better caſe than *J. S.* himſelf would have been, had he been living: and it was to be preſumed that the firſt teſtator had made a computation of his eſtate, and conſidered when the ſame would beſt bear and allow of the payment of this legacy, and there could be no reaſon given why an uncertain accident ſhould accelerate payment of this legacy before the time which was at firſt intended for that purpoſe.

(*s*) *B.* having ſeveral children, bequeathed to his ſon *Samuel Laundy*, 230l. to be paid at his age of twenty-one; to his ſon *W. Laundy*, 210l. at his age of twenty-one; to his ſon *E. Laundy*, an infant, 210l. at his age of twenty-one; to his daughter the plaintiff *Ann Laundy*, 150l. at her age of twenty-one, and made his wife the defendant *Rebecca*, executrix and reſiduary legatee. There was a clauſe in the will, that if any of his ſons and daughters ſhould die before his, her, or their reſpective ages of twenty-one, then the legacy or legacies of him, her, or them ſo dying, ſhould be paid to the ſurvivors or ſurvivor of ſuch children. The daughter and the plaintiff *Samuel* having attained twenty-one, received their legacies. *W. Laundy* died at the age of eleven, and the plaintiff *Samuel*, and the daughter filed the bill againſt the executrix *Rebecca*, to have their two thirds of *W. Laundy*'s legacy paid to them, *E. Laundy*, the other ſon being an infant. For the defendant it was inſiſted, that the plaintiffs came before their time, as they ought to ſtay for their ſhare of the deceaſed infant's legacy, until he, if living, would have attained 21. For 1ſt, the word [then] if any of the children ſhould die before twenty-one, *then* the legacy of him, or them ſo dying, ſhould go to the ſurvivors or ſurvivor, muſt be intended, in ſuch caſe, or if ſuch fact happened, and was not to be conſtrued in relation to any time, or to ſignify, that on the death of any of the children, then at that time the legacy was to be paid.—2*dly*, Legatees over, in caſe any of the firſt legatees ſhould die before twenty-one, were only ſubſtituted, and could not be in a better condition than the original legatees were; conſequently, as theſe could not take till their ages of twenty-one, for the ſame reaſon they that came in their places, could not take until the original legatees might, had they lived, have attained that age. 3*dly*, It was to be preſumed the teſtator had conſidered with himſelf at what times his eſtate would bear

(*s*) Laundy v. Williams, 2 P. Will. 478.

the payment of these several legacies, and that he had determined the legacies to his children, should be paid at 21, and in the mean time the residuary legatee should have them; and that it was unreasonable that the death of one of the legatees under 21, should accelerate the payment, or prejudice the residuary legatee, who otherwise would certainly have had the benefit of the interest, until the deceased infant should have attained 21.—And of this opinion was the Lord *Chancellor*, who pronounced his decree accordingly. But on the following day the *Solicitor General* having mentioned the matter again, and insisted that it had been determined otherwise, and that the difference was betwixt the executor or administrator of the first legatee, and the devisee over, said, if I give a legacy to *A.* payable at 21, and he dies before that time, his executors or administrators claiming under such legatee, and standing in his place, shall not be intitled to this legacy until such time as the infant legatee would have attained his age of twenty-one, if he had lived; and that this had been solemnly determined as well on an appeal to the House of Lords, 2 Vern. 199, as also by the two *Chief Justices* and the *Master of the Rolls*, upon an appeal to the *King* in council from a decree in *Antigua*. But where I devise a legacy of 100l. to an infant at 21, and if the infant dies before that age, then to *J. S.*; here *J. S.* does not claim under the infant, but the devise over to him, is as a new substantive bequest, and is to be paid on the death of the infant under the age of twenty-one. 1 *Anderson* 33, also 2 *Vern.* 283. *Papworth* v. *Moor* express in point. Upon these authorities the Lord *Chancellor* varied the decree which he had before pronounced, and ordered two thirds of the 210l. to be paid to the two plaintiffs, the brother and sister of the dead legatee *W. Laundy*, and gave interest for their two thirds from the death of the infant; for though it was objected that this being a new legacy, the executrix ought to have a year's time for the payment of it, yet the court held that must be intended to be from the death of the testator, but in this case the testator had been dead several years.

(*t*) *C.* gave a legacy of 500l. to his grand child, payable at 21, and to be allowed 11l. a year for maintenance till four years old, and 16l. a year afterwards till 21. The grand-child died before 21. Question, whether the administrator should be paid the money immediately, and so be intitled to the interest of it from the death of the infant, or wait till such time as the infant would have attained 21.—Held, That the administrator claiming under the infant, could not be in a better condition than the infant, and therefore not intitled to re-

(*t*) Roden v. Smith, Ambl. 588.

ceive the legacy till such time as the infant would have attained 21.

If *interest* be given to the legatees during minority, as interest is considered a recompense for delay in payment of the principal, their representatives will not be obliged to wait, for the legacies, until the legatees, if living, would have attained 21, the time appointed for payment of the principal to them, but the representatives will be intitled to receive the legacies immediately; Thus,—

In *Green* v. *Pigot* (*u*), Lord *Thurlow* lays down the rule, that "if a legacy be payable at 21, and the child dies, his executor cannot claim, till the time when the child would have arrived at 21, if the legacy does not bear interest, but if it be with interest, he may claim immediately. If it bears a less interest, than the utmost use, the executor has a right to the use of the money *paying the modified interest*." And in—

Cricket v. *Dolby* (*x*), The *Master of the Rolls* thus expressed himself, "Another case is, where a legacy is ordered to be paid at the age of 21, and the legatee dies before the time; shall the executor wait till the legatee would have been 21, or have it immediately? It depends upon the question, whether interest was payable or not: if it was, the executor shall have it immediately: otherwise he must wait. It is admitted that if the legatee had died, her executor could not have the legacy till the legatee would, if she had lived, have attained the age of twenty-one; there never could have been such an absurdity as the notion, that you must wait till that time, and then have the subject with the interest."

I am not aware that it is finally settled, whether any such distinctions as above, are applicable to legacies charged upon, or eventually payable out of *real* estate; there is one case indeed which I have met with where the decision is against the application, and that case was as follows;—

(*y*) *A.* having several daughters, and being seized in fee of lands, by his will charged the premises with the payment of his daughters portions, viz. 1000*l.* to each daughter at her age of 22, or marriage, but if any of his daughters died before her portion became payable, the share of her so dying was to go to the survivors. One of the daughters having died before 21, or marriage, and another having attained that age, it was insisted, that as no time was appointed for the payment of the portion or legacy which accrued by survivorship, it ought to be paid immediately; but it was determined by Lords Commissioners *Jekyll* and *Gilbert*, that the accruing or additional portion was not payable before such time as the daughter to

(*u*) 1 Bro. CC. 105, *infrà*. (*x*) 3 Ves. Jun CC. 13. (*y*) Feltham *v.* Feltham, 2 P. Will. 271.

whom it was *originally* given would have attained 22, if ſhe had lived, on the grounds that a contrary deciſion might be injurious to the heir, as alſo againſt the intention of the teſtator, who might have computed within what period the portions could be raiſed and paid with the leaſt inconvenience to his ſucceſſor.

It ſeems that when legacies are given to two or more perſons payable at the ſame period, or upon the ſame contingency, with ſurvivorſhip among them on the event of the death of any, before the time of payment, the ſurviving legatees cannot demand payment of the ſhares accruing to them by ſurvivorſhip, ſooner then they would be intitled to call for payment of their own original ſhares;—To illuſtrate this,

(z) *A.* bequeathed 1500l. to his three co-heireſſes, to be paid at their reſpective marriages, as well principal as intereſt, and if any of them died unmarried, her legacy was to go to the ſurvivor or ſurvivors. The plaintiff, one of the daughters, married and received her ſhare; the ſecond died unmarried. The queſtion was, whether the 500l. which accrued to the plaintiff and defendant, by the death of the unmarried ſiſter, was ſubject to the condition of marrying, the condition not being repeated? And by the Lord *Chancellor*, "the condition ſhall go to the whole, as well to what accrued by ſurvivorſhip, as to the original deviſe."

In *Nevill* v. *Nevill* (a) it was contended, that a legacy given to *B.* to place him out an apprentice, ſhould not be paid before *B.* arrived at an age proper for ſuch a ſituation, but the court was of a different opinion, and ordered the legacy to be paid.

In caſes where there is a ſubſtitution or addition of legacies, and there is no time appointed by the will or codicil for payment of them, nor any fund aſſigned, out of which they are to be paid, it ſeems that ſuch ſubſtituted and additional legacies will be payable out of the ſame funds, and ſubject to the like conditions, &c. as the legacies in lieu of, or in addition to which they were given: accordingly if *A.* bequeath to *B.* 1000l. charged upon real eſtate, and payable at 21, or marriage, and afterwards by codicil gives to *B.* the further ſum of 200l. in addition to what he gave *B.* by will; or if he revoke the prior legacy, and ſubſtitute a leſs, without directing the time when, or out of what fund the additional or ſubſtituted legacies ſhould be paid, ſuch added or ſubſtituted legacies will be payable at the ſame periods, and out of the ſame property, as the legacy of 1000l. firſt given.

(b) *A.* gave ſeveral legacies by his will, which he directed

(z) Moore *v.* Godfrey, 2 Vern. 620. (a) 2 Vern. 431. See the other caſes, *infrà* cap. "on the conſtruction of bequeſts," ſect. 7.
(b) Leacroft *v.* Maynard, 3 Bro. CC. 233. 1 Veſ. Jun. CC. 279. SC.

to be raiſed out of his real eſtate, and among others a legacy of 1000l. to the hoſpital in the county of *L.* and bequeathed ſpecifically his perſonal eſtate. The legacy was of courſe void by the ſtatute of Mortmain: but the teſtator by a codicil revoked that legacy, and "inſtead thereof" gave the ſum of 500l. to the hoſpital of the county of *N.* without mentioning any particular fund out of which the ſame was to be paid. By the ſame codicil he revoked ſeveral other legacies, and "inſtead thereof" gave ſmaller legacies to the ſame legatees, without mentioning any fund out of which they were to be paid. It was contended for the hoſpital of the county of *N.* that the legacy being given generally by the codicil, muſt be payable out of the perſonal eſtate, and that it might be reaſonably ſuppoſed that after making his will, the teſtator was appriſed of the invalidity of the charitable bequeſts charged on his real eſtate, and therefore revoked them, and bequeathed other legacies generally out of his perſonal eſtate. But Lord *Thurlow*, C. ſaid, he thought that the codicil only meant to alter the *quantum* of the legacies in ſome caſes, and the objects of them in others, but not the fund out of which they were to be paid, and that therefore the legacy to the hoſpital in the county of *N.* was void.

(*c*) *B.* having created a term of years for the payment of debts and legacies, bequeathed to his niece 1000l. to be paid immediately after his death, in caſe ſhe happened to be then married, but if not, he then gave the intereſt of the legacy to her for life, or until ſhe ſhould be married, but if ſhe died unmarried, he directed the legacy to lapſe for the benefit of the perſon intitled to his real eſtate. By a codicil he gave to his niece 200l. in addition to what he had given her by his will: As to what fund was applicable to diſcharge the additional legacy, the *Maſter of the Rolls* determined upon the authority of the laſt caſe, that it ſhould be paid out of the ſame property, and be liable to the ſame conditions as the original legacy of 1000l.

(*c*) Crowder *v.* Clowes, 2 Veſ. Jun. CC. 449.

SECT. II.

Of Presumptive Payment of Legacies.

COURTS of Equity are never active in extending relief to *stale* demands, except upon very special grounds. Although the statute of limitations does not bind those courts by express terms, so as to enable a defendant to plead it in bar to a suit for a legacy (*a*), yet for the sake of convenience, they have adopted its provisions by analogy in many instances in which fraud made no ingredient. Upon this principle it has been determined, that a legacy not demanded for *forty years*, should be considered *primâ facie* satisfied: but this presumption is not so absolute as to support a *demurrer* to a bill for such a legacy; for the point of satisfaction is an inference only arising from the length of time which has elapsed from the period the legacy became payable, and which may be repelled by clear, strong, and relevant evidence; if then the merits of the question were allowed to be decided in a summary way upon a demurrer, the legatee would be precluded from the opportunity of producing such testimony (*b*).

(*c*) *A.* by his will charged all his estate generally with the payment of debts and legacies. The bill was brought by the second husband of a legatee after her death, against those in possession of the estate. The bill was resisted on the ground of presumed payment, arising from the length of time which had elapsed without any demand, which was above forty years, and because the representatives both real and personal, and all the persons who could throw any light upon the question, were dead. The plaintiff to repel the presumption, proved, that one legacy of ten guineas, was not paid. He also proved an application to *C. Williams*, one of the defendants, about thirteen years ago, upon which she acknowledged that she knew the legacy had not been paid, and wondered they did not proceed against her husband for it; but doubted only, whether she or the other defendants were liable to pay the legacies, which she and her attorney thought a proper subject for the opinion of counsel. *C. Williams* by her answer, said, that when called upon, she answered that she would have nothing to do with it, and if they troubled her they must take the consequences. The

(*a*) 2 Ves. Jun. CC. 571. (*b*) 3 Bro. CC. 633. 646. (*c*) Jones *v.* Turberville, 2 Ves. Jun. CC. 11.

relief prayed against her was given up at the hearing, as it turned out that some leasehold property in respect of which she was made a party, and which was considered part of the testator's personal estate, was not so, but was bound by a settlement, so that he had not power to charge it.—The plaintiff also offered to read the evidence of some bond-creditors, that the debts due to them were not paid. All the other evidence was hearsay. They excused the length of time, by alledging several infancies in those who had possession of the estate. The defendants objected to the evidence of the creditors as interested in the event of the suit, because their testimony would go to obtain a decree, in consequence of which they would have a right to be paid, as the debts must be paid before the legacies, and the court was of opinion that the evidence could not be received. The question was, whether after a lapse of so many years, the plaintiff's demand could be supported? And Lord Commissioner *Eyre*, "It is a presumption of fact in legal proceedings before juries, that claims the most solemnly established upon the face of them will be presumed to be satisfied after a certain length of time. Courts of Equity would do very ill by not adopting that rule. So essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is better for the ends of general justice that the presumption should be made and favoured, and not be easily rebutted, than to let in slight evidence of demands of this nature, from which infinite mischief and injustice might arise. There can now be no account with effect of the personal estate, which is the fund first liable. It is now sought to make this estate liable with interest, to which it ought not to have been liable in the hands of a person who ought not to have been charged, and above forty years after this demand ought to have been put in a course of payment. If I could indulge conjecture, I doubt about the payment of these legacies. I know in *Wales*, there is a pious reverence for the representatives of the family, and that the other relations are unwilling to press them; and will take their demands upon them by a little at a time: but the interests of general justice require, that demands should not be afterwards enforced in this way. The evidence is not sufficient to repel the presumption. As to the application to *C. Williams*, evidence of an application to somebody has a degree of weight, but what she said could be evidence only against herself. She said nothing and could say nothing that could affect those against whom the decree is prayed, and she has manifested that her estate is not liable. So it only comes to this, that thirteen years ago there was an application. But what happened during the previous period? As to the other witness, there is nothing

in his evidence, that can be considered as evidence: for it is all hearsay from Mrs. *Jones*, and persons of the family, against these parties. We are reminded, that he said as to one legacy that it was not paid. With regard to the other legacies or bond-debts not being paid, I should have hesitated in considering that as evidence, that this was not paid. That *one* has forborn, is no proof that another has forborn. Therefore I doubt of the relevancy of that evidence. It is a case in which the presumption remains not rebutted; and the court is glad to discourage suits under such circumstances as this, commenced by the second husband of this lady after her death, and after the death of all people who could give any account of the affair. I am of opinion therefore, that the bill ought to be dismissed and with costs as against *C. Williams*. I am even inclined to dismiss it with costs generally: but perhaps there may be room to pause upon that, therefore, I will say nothing upon it, till I hear the opinion of Lord Commissioner *Ashhurst*."—*Ashhurst*, Lord Commissioner: "I entirely concur in thinking, that the Court ought not to entertain this suit, which is brought above forty years after the right accrued. All statutes of limitation and presumptions analagous to them are beneficial to the subject. If a man is liable after such a length of time, he is liable for interest also; and that trebles the amount of the original demand. The length of time in this case, is sufficient *prima facie* to produce the presumption. The only question is, whether any thing appears to oust it, and there is no reason for that. First, it is said, there were many infancies on the side of those in possession. If there was infancy on the part of the plaintiff, that is an answer, but he might have preferred a bill against the infant; therefore, that is no reason. As to the evidence of the application to *C. Williams*, as she turns out not to have been interested; she could not bind those who have an interest. Then there is no evidence at all to oust the presumption. The bill ought to be dismissed as against *C. Williams*, with costs. As to the other persons, I cannot say I am inclined to give costs against them. The original demand is plain; there is no positive evidence that it was paid; and though the presumption is that way, yet there is such a foundation for the bill as to make it not a case for costs."

In the case of *Pickering* v. Lord *Stamford* (*d*), decided by the *Master of the Rolls*, upon a claim made by the representative of one of the testator's next of kin after a lapse of 35 years, to such parts of the testator's residuary estate as were secured upon real property, upon the ground that the disposition was void by the

(*d*) 2 Ves. Jun. CC 272.—280.

statute of Mortmain; his Honour acknowledged the propriety of the decision of the Lords *Commissioners* in the case last stated, and said, if the case before him had been that of a *legacy*, he should have been of opinion that a bar had incurred from the length of time which had elapsed, upon the ground of presumptive satisfaction.

SECT. III.

Of the Appropriation of Legacies.

ALTHOUGH legatees are not intitled to receive their legacies before the time appointed for payment, yet they are intitled to have them divided from the bulk of the teſtator's eſtate, and ſecured, and appropriated for their benefit whenever the event ſhall take place upon which ſuch legacies are payable. Thus;—

(*a*) *A.* in 1775 deviſed to the defendants all his real eſtates, upon truſt, to ſell, and to ſtand poſſeſſed of the money to ariſe by ſuch ſale, and of the rents and profits in the mean time, and he alſo gave to them his perſonal eſtate upon truſt, to pay his debts and funeral expences, and, ſubject thereto, to pay legacies, amounting together to 40,000l. and (among them) to the plaintiff a legacy of 5,000l. He directed the legacies to be paid to the reſpective legatees being males, at 21, and being females at their ages of 21, or days of marriage, which ſhould firſt happen, with intereſt in the mean time not exceeding 4l. per cent. per ann. and directed the intereſt to be paid by half yearly payments, or in ſuch other manner as the defendants ſhould think proper. And he further directed, that if the legatees being females, ſhould die under the age of 21, not having been married, or being males, ſhould die under the age of 21, then the legacies to the perſons ſo dying under that age ſhould not be paid, but ſhould be conſidered as part of the reſidue of his perſonal eſtate, and he gave the reſidue to the defendants, and his ſiſter *M. Fiſher*, equally, and appointed the defendants executors.—The teſtator died in 1777, leaving the defendant Sir *R. Pigott*, his eldeſt brother and heir, and the defendants proved the will. In 1780, the plaintiff, by *William Green*, her father, and next friend, filed her bill againſt the defendants, to have the legacy of 5,000l. paid into the Bank of England, in the name of the Accountant General, with intereſt at 4l. per cent. per ann. from the death of the teſtator, till ſuch payment ſhould be made, to be placed out in proper funds, or to have the ſame ſecured for her benefit, and that the intereſt of the legacy might accumulate for her benefit, till ſhe married or attained 21, and in the mean time for a proper allowance out of ſuch intereſt for her maintenance and education. The defendants by their anſwer, admitted aſſets, and the cauſe coming on to be heard

(*a*) Green *v.* Pigot, 1 Bro. CC. 103.

before the *Maſter of the Rolls*, he referred it to the Maſter to compute intereſt on the legacy at 4l. per cent. per ann. from the end of one year after the teſtator's death, and ordered that the produce ſhould be laid out in the purchaſe of Bank 3 per cent. conſolidated annuities in the name of the Accountant-General, upon the truſts, and ſubject to the contingencies in the teſtator's will. From this decree there was an appeal to Lord *Thurlow*, Chancellor, who gave judgement as follows:—"The rule ſeems to have varied, different opinions having obtained at different times. Lord *Hardwicke* ſeems ſometimes to have thought that money to be raiſed ſhould not be raiſed till the time of payment. *Palmer* v. *Maſon*, 1 Atk. 505.—*Heath* v. *Perry*, 3 Atk. 101. are both ſtrong caſes to ſhew his opinion to be ſo. The latter caſes have been, that the fund ſhould be appropriated. *Ferrand* v. *Prentice*, 10th July, 1750, before Sir *Thomas Clark*, *E. Prentice* gave to the plaintiff 200l. to be paid ten years after her death. Upon bill filed to admit aſſets and give ſecurity, or to pay the money into the bank, it was decreed that the executor ſhould do ſo, and that he ſhould have the intereſt in the mean time, and, at the end of the ten years, the principal ſhould be paid to the plaintiff.—*Walker* v. *Cook*, 15th February, 1781; Legacy left to one to be paid at 24, the plaintiff being 12, the father filed a bill that the legacy might be inveſted in the funds, and decreed ſo, though it was declared, that the plaintiff was not entitled to themoney till 24.—*Johnſon* v. *De la Cruze*, 17th July, 1749; 2000l. left to the teſtator's daughter at 21, in default, to her child; if no child, to *Mills*; bill to ſecure the fund; the court ſaid a party ſo circumſtanced might come here to have part of the perſonal eſtate ſecured for the legacy. In *Pierce* v. *Taylor*, 22d May, 1778, the ſame was ſaid to be the courſe of the court. Theſe caſes go to prove, that where a legacy is to be paid, it muſt be ſecured. I do not ſee a diſtinction as to its being contingent or merely future. If a legacy be payable at 21, and the child dies, his executor cannot claim till the time when the child would have arrived at 21, if the legacy does not bear intereſt, but, if it be with intereſt, he may claim immediately. If it bears a leſs intereſt than the utmoſt uſe, the executor hath a right to the uſe of the money, paying the modified intereſt, *Cheſter* v. *Painter* (*b*). Here, I do not incline to alter the decree at the *Rolls*. The legacy is to the child, payable at 21, with four per cent. intereſt, which is the ordinary intereſt given by the court. If the intereſt were ſevered from the principal, I muſt order that to be ſecured. Giving intereſt even at 2 per cent. veſts the principal. Whether the legacy be payable at a fixed or a *contingent* future day,

(*b*) *Supra*.

the effect is the ſame. I muſt ſecure the intereſt of the fund. If the intereſt was ſevered as an allowance, I muſt ſecure a fund equal to it. The *Maſter of the Rolls* has done right in ordering it to be laid out in the funds, but if it ſhould produce more than 4l. per cent. who is to have the ſurplus? I may order it to be paid to the executor. But ſhould it produce leſs, can I order the executor to make it up? No, I think therefore, the produce muſt be to the uſe of the infant."—Decree affirmed.

(*c*) *B.* bequeathed to the plaintiff 15,000l. to be paid at 21 or marriage, with intereſt in the mean time, but if ſhe died before, to ſink. Queſtion, whether the legacy ſhould be appropriated, and intereſt paid, or no intereſt ſhould be raiſed, until the legacy was payable? and by the *Maſter of the Rolls*, "The firſt point is, as to the legacy of 15,000l. If there were no direction as to intereſt, the law is, that where a parent gives a legacy to a child unprovided for, the child ſhall have intereſt from the day of the parent's death, but here the intereſt muſt paſs by the very words of the will. I think the money muſt be immediately raiſed, although the child may not live to attain the age of 21 or be married," and his Honour referred to the laſt caſe.

When the appropriation is made in *pais*, by the executors or truſtees, the whole ſum muſt be properly inveſted, and they muſt proceed in the ſame manner as the Court of Chancery would do, if a ſuit had been inſtituted to have the legacy ſecured, in which caſe, the appropriation will be good; but if they act otherwiſe, they will not be indemnified in making the appropriation, although they may have acted *bona fide*.

(*d*) *A.* bequeathed 4000l. to his couſin *S. Cooper*, a co-plaintiff with her huſband, to be paid within three months after her marriage, provided ſhe married with the conſent of her father; but if ſhe did not, then it was to go over, &c. The teſtator alſo directed that until ſuch marriage, intereſt at 3 per cent. ſhould be paid to the legatee, and appointed *E. Wine*, executrix. In 1767, the executrix being about to marry the defendant *Gibbons*, inveſted the 4000l. in the purchaſe of 4440l. ſtock, and conveyed the ſame to truſtees, in truſt, to pay *S. Cooper* 4000l. with intereſt at 3 per cent. and the ſurplus-intereſt to her the executrix. The legatee afterwards intermarrying with the co-plaintiff *Cooper*, and the ſtock turning out not equal in value to the 4000l. they filed the bill ſtating the marriage, and a ſettlement previous to it, and that *the ſtock purchaſed was not equal in value* to the legacy, and praying that *Gibbons*, the

(*c*) Carey *v.* Aſkew, 2 Bro. CC. 59. (*d*) Cooper *v.* Douglas, 2 Bro. CC. 232.

husband of the executrix, who was then dead, might pay to the trustees in the settlement, the difference between the value of the stock purchased and the 4000l. legacy. And Lord *Thurlow*, C. "The question is, whether the legacy was taken out of the testator's property. The uses declared by the deed are expressly to pay the legatee 4000l. with interest at three per cent. and to pay the residue of the interest to the executrix. If a legatee has the legacy anticipated, he must stand or fall by it, but then he must have the whole sum. When the court appropriates a legacy, it orders a sum equal to the legacy to be laid out; but I do not remember any case in which the court has done so, and given any part of the intermediate interest to another person: the executrix could not take the surplus-interest. The money must remain in court, subject to the application of the parties, and it must be referred to the master to enquire into the settlement, and to whom it shall be paid."

(*e*) Prior to the marriage of the plaintiff *W. Hutcheson* and *Frances* his wife, certain estates which descended to *Frances*, *ex parte maternâ*, were conveyed to the use of *Frances* until the marriage, and afterwards in trust for her during life, to her sole and separate use, remainder to such persons, as she notwithstanding coverture should appoint.—*Frances* by will in pursuance of her power, appointed that the trustees in the settlement should after her death sell the estates, and after deducting 100l. each for themselves, lay out the residue of the money to arise by the sale in the funds, and permit the interest to be received by the plaintiff *W. Hutcheson*, her husband, for life, and after his death to pay to the plaintiff *Ann Jones*, therein called *Ann Hutcheson*, and *Walter Hutcheson*, the two youngest children of *W. Hutcheson*, 1500l. a-piece, but if either of them happened to die before his or her legacy became payable, then to pay the legacy of him or her so dying to the survivor; and to pay 500l. other part of the said principal money to her cousin *E. Parker*, if living at the death of the testatrix's husband, but if not, then to pay the 500l. to *Ann Jones*. She also directed her trustees to pay 1000l. other part of the said principal money to *G. Parker*, her executor's, &c. and all the residue of the said principal money, with the interest or dividends which might be due thereon, unto the three youngest sons of *W. Hammond*, to be equally divided between them, but if any or either of them happened to die, then to the survivors or survivor, and if all died before the same became payable, then to *P. Hammond*; and she appointed her husband *W. Hutcheson*, executor and residuary legatee of her personal estate, over which she had any disposing power.—*Walter Hutcheson* died in the life of the testatrix; and after his death, she,

(*e*) Hutcheson *v.* Hammond, 3 Bro. CC. 128, 144.

under her power, added a codicil to her will, and after reciting the death of *Walter*, by which the plaintiff *Ann Jones* would be entitled to the two ſums of 1500l. and alſo to 500l. if *E. Parker* died before the plaintiff *W. Hutcheſon*, and which afterwards happened, the teſtatrix willed that if *Ann Jones* ſhould in the life of *W. Hutcheſon*, marry without his conſent in writing, her truſtees ſhould pay the two ſums of 1500l. and alſo the ſum of 500l. in caſe of the death of *E. Parker*, unto ſuch perſons, &c. as *W. Hutcheſon* ſhould by will appoint.—The plaintiffs *W. Hutcheſon* and *Ann Jones* ſurvived the teſtatrix; *E. Parker* died in the life of *W. Hutcheſon*; and *Walter Hutcheſon* and *E. Parker* being both dead, *Ann Jones* became entitled to the ſums of 1500l. 1500l. and 500l. ſubject to the life-intereſt of her father *W. Hutcheſon*.—After the teſtatrix's death, the truſtees ſold the eſtate for 6,500l. and having paid all coſts, &c. and retained the 100l. bequeathed to each of them, there remained in their hands 6,252l. 6s. 2d. as a reſidue of the money ariſing from the ſale. They inveſted 2695l. in the purchaſe of 4900l. 3 per cents. but kept back 3,500l. to be inveſted, to anſwer the amount of the legacies given to *Ann Jones*, ſubject to her father's life, in caſe they ſhould be juſtified in ſo doing.—The plaintiff *W. Hutcheſon*, made ſeveral applications to *Peter Hammond*, the acting truſtee, to inveſt the 3,500l. in the funds, and ſeveral letters paſſed upon the ſubject; the reſult of which was, that the truſtees were deſirous that the money ſhould be laid out, and appropriated to anſwer the legacies, and that ſum, with 17l. 10s. (in order to make the ſtock purchaſed an equal ſum) was laid out by the broker of the truſtees, in the purchaſe of 6,400l. 3 per cents. of which notice was given by *Peter* to *Hutcheſon*, by a letter, but no declaration of truſt was made by the truſtees, *Peter* having adviſed the father not to incur that expence. The plaintiffs *P. Jones* and *Ann* his wife, (the before-named *Ann Jones*) intermarried, ſhe having firſt duly obtained in writing the conſent of her father; and by ſettlement made prior to the marriage, it was agreed that their proportionable ſhare of the ſtock ſhould be aſſigned to the father and other truſtees to the uſes of the marriage. The bill among other things prayed it to be declared that the truſtees of the marriage ſettlement of *P. Jones* and *Ann* his wife, were entitled to the 3 per cent. annuities purchaſed with the 3,500l. upon the truſts of ſuch ſettlement, and that the ſtock might be transferred to them. Queſtion, whether what had been done amounted to an appropriation? and if ſo, whether ſuch appropriation could be made without the conſent of the perſons who might ultimately become intitled, upon the contingency of its becoming forfeited by a marriage without conſent, and no appointment made by the plaintiff *W. Hutcheſon*, purſuant

to the power in the codicil, which introduced another conſideration, whether the condition in the codicil would be a forfeiture, in caſe ſhe ſhould, upon the death of her then preſent huſband, marry *again* in the life of her father without his conſent? And by *Buller*, J. "The next queſtion relates to the 3,500l. given to the plaintiff *Ann Jones*; and upon this, ſeveral queſtions have ariſen,—1ſt. Whether this ſum could have been appropriated by the truſtees, or the court—2dly. Whether it has been ſo appropriated—3dly. Whether it can be now paid to the truſtees under her marriage ſettlement?—With reſpect to the firſt queſtion, whether it can be appropriated? it is only neceſſary to go to the caſe of *Green* v. *Pigot* (*f*), which decides, that even on contingent intereſts, any perſon intereſted, may come and have the fund appropriated; and it is convenient, and indeed neceſſary that it ſhould be ſo; and in caſes where the intereſt of the fund has been given to *A.* and the principal, ſubject to that intereſt, diviſible among ſeveral parties; upon the application of *A.* the court has interfered. The queſtion is, whether there are other rights affected by the appropriation; where that is not the caſe, it has been frequently done. I did it laſt week in the caſe of Lady *Cavendiſh*, and ordered the fund of which ſhe was intitled to the intereſt, to be paid to her ſon, ſhe coming in and conſenting. Then if the court would have appropriated the fund, the truſtees are juſtified in doing it without it's intervention. The ſecond queſtion is, whether they have appropriated it? If the truſtees are not decided in their opinion, they have a right to aſk the opinion of the court; in this caſe the truſtees have acted a fair and honourable part, to give every perſon intereſted, every advantage they could. They certainly have not thought the reſiduary legatees, the perſons principally intereſted; if they had I ſhould not have approved their conduct. The particular legatees are the principal objects of the teſtator's bounty, and therefore not to be ſacrificed to the intereſt of the reſiduary legatees, who are more remote in his intention. The truſtees did not chuſe to do it, without the opinion of the court; but the tenor of their letters is, that *they are ready to do it if they can.* They have made the appropriation, and by the letters and conduct both of the father and daughter, it appears they have allowed and approved of it. The father in one of his letters ſays, he will make it up a round ſum, and that he is ready to take it at all riſks. The truſtees ſeparated that ſum, as a ſum to pay the father and daughter the legacies. But let us ſee what could have been the intention of the parties. The ſum to be laid out was to be 3,500l. but that could not be done exactly: the broker added

(*f*) *Supra.*

thereupon 171. more. Was it neceſſary the truſtees ſhould be exact? clearly not, after the father had ſaid he would make it up a *round* ſum. Then with reſpect to the declaration of truſt, it appears a declaration of truſt was prepared; but Mr. *Hammond* thought it unneceſſary to put Mr. *Hutcheſon* to that expence. It does not admit of a doubt, that the ſum was laid out for the payment of the legacies, and the only condition intended was, if the court ſhould approve; if it did, it ſhould operate as an appropriation. The queſtion, therefore is, whether ſtock ſhould now be transferred to the truſtees of *Ann Jones*'s marriage-ſettlement, the father being intitled to the intereſt for his life. I have doubted more upon this part of the caſe than the others. It was ſtrongly preſſed by Mr. *Mitford*, that the father could not give up his power of re-appointing, on the daughter's marrying during his life without conſent. If any perſon is intereſted beſides the father and daughter, I cannot order this ſum to be transferred. I am clear, the power cannot be releaſed, *Co. Litt.* 265, b. *Brownlow*, 210. But if the condition is releaſed, it ſhould ſeem that the power is void. This depends upon the queſtion, whether the condition is ſatisfied by *Ann Jones*'s firſt marriage with the conſent of her father. The words of the codicil are very ſtrong. There are caſes where conditions of this kind are conſidered odious, and if this condition were extended beyond a firſt marriage, it might be attended with inconvenience, and I do not think it would fall within the original intention of this condition. The intention of theſe conditions is, to prevent children from making inconſiderate engagements; they therefore do not extend to the caſe of a widow, or to a ſecond marriage, and therefore the court is warranted to ſay, the condition is complied with by the firſt marriage: that the legacy is veſted, and the condition gone; conſequently there is an end to the father's power, and nobody is now intereſted but the father and the daughter: and the caſe ſtands upon the ſame ground with that of Lady *Cavendiſh*, where the tenant for life agrees to give up the advantages of a ſum of money for life, and conſents to it being paid immediately to the perſon intitled to the principal." It was, therefore decreed that the 3,500l. ſhould be paid to the ſurviving truſtee in *Ann Jones*'s ſettlement.—The cauſe being reheard before Lord *Thurlow*, C. he expreſſed himſelf to this effect:—"None of the caſes have been attended with the ſame circumſtance as the preſent;—That the land is to be ſold, the money inveſted in the funds to the uſe of one for life, then the funds to be ſold, and the money to be divided, by which it might happen that the reſidue would be very great or very ſmall, or even that the legatees muſt abate: I think the direction to lay out the money in the funds was merely for the purpoſe of arrangement, and

the rights of the parties were not intended to be affected by it. In order to say that they were to be affected, the testatrix must have foreseen the event, and have intended to give the residuary legatee a chance, what would be the event of the funds; if so, I agree it would be impossible for the father to do more than to give up his own chance, and he could not enable the daughter to make an immediate claim. On the other side it is said, she meant only to make an arrangement. It is material to consider it with a view to the original transaction. Suppose her intention was to give the residuary legatee a chance, what might be the value of the stock in the event; the court could not order it to be divided till the death of the tenant for life: but I think the better construction is, that it was merely for the purpose of an arrangement, in which case if the father would release his interest, either to his daughter or the residuary legatee, it would give an immediate interest, and consequently there might be an appropriation.—Then the appropriation was made conditionally, to abide the inquiry, whether it could be made: I am inclined to think the appropriation could be made, and if so, it is made." Decree affirmed.

In cases where parts of the testator's personal estate are specifically bequeathed for life, with a limitation over upon the death of the person taking the life interest, such legatee must sign and deliver an inventory of the chattels so bequeathed to him, in order that they may be ascertained for the information and benefit of the subsequent or second legatee (*g*). It appears to have been the ancient practice of the court, to require the person intitled to the partial interest in the bequest, to give security to or for the benefit of the legatee appointed to succeed him (*h*). But the practice became gradually altered as above stated, upon a conviction, that requiring from the first legatee an inventory only of the property bequeathed, was attended with more equal justice to both legatees. If, however, particular circumstances were shewn under which it would be dangerous to trust the property to the first legatee or executor, without taking a sufficient security, as in instances of insolvency, &c. such security would be ordered to be given. Accordingly in a case, where—

(*i*) *A.* gave a legacy to his child, an infant, payable at 23, and made his wife executrix, who married a second husband and died; the husband took administration *de bonis non*, with the will annexed, his wife being residuary legatee. The bill *suggested his insolvency*, and prayed that he might give security to pay the legacy when due, and it was decreed according to the prayer.

(*g*) 3 P. Will. 335. 1 Atk. 470. 2 Atk. 82. (*h*) Chanc Rep. 112. 2 Vern. 452. 9 Mod. 93. (*i*) Rous *v.* Noble, 2 Vern. 249.

In *Foley* v. *Burnell* (*k*), Lord *Thurlow* ſaid, "the caſes as to tenant for life giving ſecurity for the goods have been overruled, and the court now demands only an inventory, which is more equal juſtice, as there ought to be *danger*, in order to require ſecurity."

(*k*) 1 Bro. CC. 279. Carth. 458, S. P.

CHAP. IX.

Of the Abatement and Refunding of Legacies.

IF a teſtator's aſſets be inſufficient to pay both debts and legacies, the pecuniary legatees muſt abate proportionably *inter ſe* (*a*): and if any of them receive the whole amount of his legacy, ſuch legatee will be obliged to refund ſo much as will reduce it to an equality with the reſt.

In caſes of legacies of ſtock operating as *general* legacies, when the legatees are called upon to abate with other pecuniary legatees, the abatement will be regulated according to the value of ſtock at the end of one year next after the teſtator's death.—Thus in;

Blackſhaw v. *Rogers* (*b*), the teſtator gave 200l. conſols to *J. R.* to keep a monument in repair, and to retain the ſurplus for his own uſe. By a codicil, he gave the intereſt of 300l. to *M. C.* for life, directing the principal after her death to fall into the reſidue. There being a deficiency of aſſets, Lord *Thurlow*, C. decreed that *J. R.* and *M. C.* were to abate in proportion, and that the Maſter ſhould inquire into the value of the ſtock, at one year from the teſtator's death.

It is a rule in equity to preſume, that when an executor pays one legacy, he has poſſeſſed aſſets ſufficient to pay all the legacies, and although the fact may not be ſo, yet not to admit proof to the contrary, therefore in ſuch caſes executors will be obliged to make up the deficiency out of their own money, as the court will not permit them to inſtitute ſuits againſt the legatees whom they have voluntarily paid, to oblige them to refund.

(*c*) *A.* by his will, after giving ſeveral conſiderable legacies, appointed his brother *J. Coppin*, executor and reſiduary legatee. —*J. Coppin* filed his bill, alledging that he had paid the legatees more than the aſſets would allow, merely upon a miſrepreſentation of the value of the teſtator's perſonal eſtate, which had ſuffered unexpected loſſes, he therefore inſiſted, that if he through importunity or kindneſs to ſeveral of the legatees who were his relations, had paid legacies beyond the aſſets, ſuch over-payments ſhould be refunded. But Lord *King*, C. ſaid that there did not appear to be any fraud or miſrepreſentation made uſe of by the legatees to whom the payments had been made; and

(*a*) 1 P. Will. 422. (*b*) Cited by the Maſter of the Rolls, in Simmons *v.* Vallance, 4 Bro. CC. 349. (*c*) Coppin *v.* Coppin, 2 P. Will. 292, 296.

there being much more reaſon to think that *J. Coppin*, the executor was cognizant of and informed concerning the teſtator's circumſtances than the legatees, his Lordſhip therefore would not order any refunding; and being a hard caſe, no coſts were given on either ſide.

The exceptions to the rule ſeem to be where the executor has not paid the legacy voluntarily but by compulſion; or when debts have been claimed after the aſſets were diſtributed among the other creditors and legatees, and perhaps in both caſes the executor may compel the legatee to refund.

In *Newman* v. *Barton* (*d*), the queſtion was, whether an executor ſhould compel a legatee to refund, and the caſe of *Grave v. Bainſon*, was cited, where one legatee being paid in full his whole legacy, and there wanting aſſets to pay the other legacies, it was decreed for the benefit of the unſatisfied legatees, that the legatee who had received his full legacy ſhould refund and be paid only in proportion.—The caſe of *Hodges* v. *Waddington*, was alſo cited, where a creditor compelled a legatee to refund. And *per curiam*, "A creditor ſhall follow the aſſets in equity into whatever hands they come. But where the executor has *voluntarily* paid the whole legacy, and afterwards the aſſets prove deficient to pay the other legacies, they conceived that neither the executor nor any of the other legatees ſhould compel him to refund. But if the payment had not been voluntary, but the legatee had recovered the legacy by decree, there he ſhould have refunded."

In *Nelthrop* v. *Biſcoe* (*e*), it was ſaid and admitted by the court, that if the executors pay away the aſſets in legacies, and afterwards debts appear, and they be obliged to pay them, of which debts they had no notice before the legacies were paid, the executors by a bill might compel the legatees to refund.

(*f*) Bill by an executor againſt a legatee to refund a legacy voluntarily paid to him by the executor, the aſſets falling ſhort to ſatisfy the teſtator's debt. Decreed, that the defendant ſhould refund to the plaintiff, and that an executor may bring a bill againſt a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the teſtator out of his own pocket, ſtands in the place of the creditor, and has the ſame equity againſt a legatee to compel him to refund.

In general an unſatisfied legatee cannot maintain a ſuit againſt a legatee who has been paid by the executor; for the remedy in the firſt inſtance is againſt the executor, who, by paying one legacy, has admitted aſſets for the payment of all. Thus in *Orr* v. *Kainet*. (*g*), Sir *John Strange*, M. R. ſaid

(*d*) 2 Vern. 205. (*e*) 1 Chan. Ca. 135-6. (*f*) Davis *v.* Davis, 8 Vin. Abr. "Deviſe," p. 423. pl. 35. (*g*) 2 Veſ. 194.

Pearſon, and they, and *Ruſhworth*, who was then an infant, filed the bill againſt *Simpſon* and *Wright*, *Thorley* being dead, and againſt the aſſignees and the bankers, praying that it might be declared that the funds transferred by *Simpſon* to the bankers were liable to the plaintiffs' legacies. The defendants *Moffat* and *Co.* ſtated in their anſwer that about February, 1794, *Simpſon* opened an account with them as bankers, which continued till his bankruptcy; in the courſe of which, he drew a number of bills upon them, and was always or for the moſt part in their debt, for which they repeatedly preſſed him, and frequently refuſed to accept and pay his bills until he remitted money to diſcharge or leſſen the balance, and informed him, that they would not continue ſuch account, unleſs he made remittances to anſwer the bills. That on the 11th of May, 1797, he was indebted to them in 399l. 18s. 5d. beſides bills which they had accepted for him, not then due, and having repreſented that he was under the neceſſity of immediately providing a large ſum of money, requeſted them to advance it, and to induce them to do ſo, offered to tranſfer the funds mentioned in the bill as a ſecurity, as well for the balance then due, as alſo for what they ſhould then advance, and alſo for all other ſums which they ſhould at any time afterwards pay on his account. That the defendants having upon thoſe terms agreed to advance the money which *Simpſon* then wanted, he, on the 11th of May, 1797, transferred to them 100l. 3 per cent. conſols, and the ſtock mentioned in the bill. That the 100l. 3 per cents. were then ſtanding in the names of *Luſh* and *E. Smith*, and the other funds in the name of *John Smith*, which the defendants knew, as at *Simpſon*'s requeſt they received the dividends under a power of attorney from *E. Smith*, which they always placed to the credit of *Simpſon*'s account. They denied they either knew or ſuſpected that the funds were not at the time of the tranſfer, the abſolute property of *Simpſon*, as executor or deviſee of *E. Smith*; that they were part of the perſonal eſtate of *John Smith*: but on the contrary that they believed they were *Simpſon*'s own property, and that *Simpſon* repreſented to them that he was abſolutely entitled thereto, ſubject only to an annuity of 20l. to *E. Smith*'s ſiſter for life, and to a few ſmall legacies; that he had full power to diſpoſe thereof, and would have done ſo, but for the low price of the funds, which he expected would riſe. They alſo ſtated they did not know that any of the legacies to the plaintiffs or to any other perſon were unpaid, and ſet forth a letter from *Simpſon* to them, ſtating the death of Mrs. *Smith*, that ſhe had left him the whole of her property, paying 20l. a year to her ſiſter for life, then 76 years old, and a few very ſmall legacies; that

he intended ſhortly to be in *London*, ſuppoſing her will neceſſary to be proved there, on account of the money in the funds, and ſtating his intention to produce the will to them, before he ſhould do any thing, being well aſſured they would adviſe him for the beſt to ſave expence.—The defendants then ſtated, that in conſequence and in faith of the transfer, they on the 13th of May, 1797, paid bills and notes on *Simpſon*'s account to the amount of 673l. 1s. 6d. which they believe was the ſum or part of it, for which he was anxious to provide. That on the 16th of February, 1798, he gave the defendants the following authority in writing.—"Meſſrs. *Moffatt*, &c. Gentlemen, having ſome time back transferred into the name of your partner, Mr. *Kenſington*, ſundry ſums of different ſtocks and annuities, as a ſecurity for any advances or engagements which you might at that time have come under, or might at any future time come under for me, I hereby authorize you to ſell or otherwiſe diſpoſe of the ſame, whenever you may think proper, at my riſk and for my account; and I will confirm and approve of the ſame, and will, whenever required by you, execute a legal inſtrument to that effect—*Joſeph Simpſon*."—The defendants then ſtated, that upon the faith of the transfer, and ſecurity of the ſaid funds, they paid the bills of *Simpſon* to a much greater amount, and ſuffered him to be in arrear in a much larger balance, than they had before done, ſo that when he became a bankrupt he was indebted to them 1,435l. 19s. 6d. That they never had any other ſecurity, except that *Simpſon* and *E. Smith*, executed a bond to them in December, 1795, for ſecuring any balance which might be due from *Simpſon*, in account between him and them, and the bills, drafts, and notes paid to them as his bankers, which when received, they placed to the credit of his account.——The queſtion was, whether *Simpſon* as executor, could pledge this property for his own debt, ſo as to preclude the legatees from following it into the hands of Meſſrs. *Moffatt*, &c.? And by the *Maſter of the Rolls* "The queſtion is, whether the plaintiffs legatees can follow the aſſets in the hands of third perſons, to whom the executor has transferred them. There is no evidence in the cauſe but the anſwer. I cannot therefore infer any thing againſt the defendants, which they do not admit; for it was in the power of the plaintiffs to procure an explicit admiſſion or denial of every fact, within the knowledge of the defendants. I cannot aſſume that they ever ſaw Mrs. *Smith*'s will, though *Simpſon* ſays, he was to produce it to them; for they do not ſay, they ever did ſee it. Without doubt the plaintiffs are entitled to a decree againſt the executor now a bankrupt; and his aſſignees are parties. Several well known caſes were referred to on both

ſides. The defendants rely upon *Nugent* v. *Gifford* (*l*), *Mead* v. Lord *Orrery* (*m*), and *Whale* v. *Booth* (*n*), as eſtabliſhing the abſolute right of the executor, to bind the aſſets by any diſpoſition; at leaſt, where there is no actual fraud in the party taking under it. The other caſes, *Humble* v. *Bill* (*o*), *Crane* v. *Drake* (*p*), *Farr* v. *Newman* (*q*), *Bonny* v. *Ridgard* (*r*), and *Andrew* v. *Wrigley* (*s*), are relied on by the plaintiffs, as ſhewing that there are limits to that rule; which limits they contend are here tranſgreſſed. Though it is difficult to reconcile all the doctrine and *dicta*, that are to be found in the caſes, the deciſions do not appear to me to be inconſiſtent. It is true, that executors are in equity mere truſtees for the performance of the will: yet in many reſpects and for many purpoſes third perſons are entitled to conſider them abſolute owners. The mere circumſtance, that they are executors, will not vitiate any tranſaction with them; for the power of diſpoſition is generally incident; being frequently neceſſary; and a ſtranger ſhall not be put to examine, whether in the particular inſtance that power has been diſcreetly exerciſed. But from the propoſition, that a third perſon is not bound to look to the truſt in every reſpect and for every purpoſe, does it follow, that dealing with the executor for the aſſets, he may equally look upon him as abſolute owner, and wholly overlook his character as truſtee, when he knows the executor is applying the aſſets to a purpoſe wholly foreign to his truſt? No deciſion neceſſarily leads to ſuch a conſequence. In *Nugent* v. *Gifford*, it appears from the Regiſter's Book, as ſtated in *Andrew* v. *Wrigley*, though not in the report in *Atkins*, that the teſtator died two years before the executor and reſiduary legatee made the aſſignment that was impeached. At leaſt, therefore, there was room to ſuppoſe, that the executor might in that period, by advances on account of the truſt, have entitled himſelf to reimburſement out of the aſſets: but even ſo explained, the late *Maſter of the Rolls* would not go farther than to ſay, that caſe might be rightly decided; and in *Scott* v. *Tyler*, 2 Bro. CC. 477, Lord *Thurlow* ſaid, it was difficult to reconcile it with *Crane* v. *Drake*. In *Mead* v. Lord *Orrery*, Lord *Hardwicke*, inſtead of ſtating ſhortly and generally, that an executor has the abſolute right, to diſpoſe as he pleaſes of the teſtator's property, enters into all the circumſtances to ſhew that in that caſe, the aſſignment ought to ſtand; that it was made ſeveral years after the teſtator's death; that it was not the caſe of a ſole executor diſpoſing for his own benefit, but of three executors, two not intereſted, one a reſi-

(*l*) 1 Atk. 463, ſtated from the Regiſter's book by the Maſter of the Rolls, 4 Bro. CC. 136. (*m*) 3 Atk. 235. (*n*) 4 Term Rep. 625—note. (*o*) 2 Vern. 444, 1 Bro. P. C. 71. (*p*) 2 Vern. 616. (*q*) 4 Term. Rep. 621. (*r*) Stated 4 Bro. CC. 130. (*s*) 4 Bro. CC. 125.

duary legatee; that as he was one of the executors, and in his banking ſhop, the money affairs were tranſacted, he might have been as he was recited to be, the ſole owner of the mortgage: he might be a creditor for that ſum, by advances made by him: or it might have been releaſed and aſſigned to him by the other executors, as his ſhare of the reſiduary eſtate. Under all thoſe circumſtances, perhaps it would have been hard to have deprived the aſſignee of the benefit: and yet Lord *Kenyon*, in *Bonny* v. *Ridgard*, with an accurate note of which I have been favoured by Mr. Cox, declared his diſſent from that caſe, and declared that he ſhould have given the oppoſite deciſion, and yet there was nothing like expreſs fraud; and no motive for it in order to obtain that aſſignment, for *Mead* the younger, was not indebted, but was only to give ſecurity for what might come to him afterwards as receiver; and he uſed the mortgage for that purpoſe. It was indifferent to them, whether they had that or any other ſecurity. But Lord *Kenyon* ſays, that if there be either expreſs or implied fraud, the purchaſer is bound. In *Whale* v. *Booth*, though that caſe ſeems over-ruled by *Farr* v. *Newman*, ſtreſs was laid upon the circumſtance, that the teſtator had been dead three years. And Lord *Mansfield* ſays, 'if the executors paid all demands, as in that time they might have done, the aſſets belong to them.' Thoſe three caſes for the defendants are in ſome degree impeached in ſubſequent deciſions. But ſuppoſing they were not impeached, there is nothing in any of them excluding the poſſibility of the executor having acquired on the execution of the truſt, a right to appropriate to himſelf the aſſets. But in this inſtance, the aſſignment was made in leſs than a month after the death of Mrs. *Smith*. There is not, therefore, the leaſt ground for the preſumption of right required to the aſſets of Mr. or Mrs. *Smith*, by payments made in that ſhort interval on account of either eſtate. It is not pretended it was to ſatisfy any claim on either eſtate: for the expreſs purpoſe appears to have been to ſecure a debt of his own, which he already owed to the bankers, and other advances they were to make by taking up bills of his, then actually outſtanding. They had diſtinct notice therefore, that the money was not to be applied to any demand upon either eſtate; but the aſſets were to be wholly applied to the private purpoſe of the executor. Allowing every caſe to remain undiſturbed, does it follow from any, that an executor in the firſt month after the teſtator's death, can apply the aſſets in payment of his own debt? and that a creditor is perfectly ſafe in ſo receiving and applying them, provided he abſtains from looking at the will, which would ſhew the exiſtence of unſatisfied demands? I am for the moment, keeping out of ſight the repreſentation made by *Simpſon*, and ſuppoſing the queſtion to be, whether an executor may thus

deal and be dealt with; and it is clear, that no rule of juſtice permits, or of convenience requires, that he ſhould have this unbounded power. Though it may be dangerous at all to reſtrain the power of purchaſing from him, what inconvenience can there be in holding that the aſſets, known to be ſuch, ſhould not be applied in any caſe for the executor's debt; unleſs the creditor could be firſt ſatisfied of his right. It may be eſſential that the executor ſhould have the power to ſell the aſſets: but it is not eſſential that he ſhould have the power to pay his own creditor, and it is not juſt, that one man's property ſhould be applied to the payment of another man's debt. But the queſtion is, not whether the rule is now to be made more ſtrict, but whether general juſtice and convenience require it to be relaxed beyond all former precedent? I ſhould heſitate to go ſo far as other caſes have gone: but this would go much farther than any. If the ſecond point in *Scott* v. *Tyler*, had received the deciſion, which it was generally ſuppoſed would have been given (*t*), it would be an authority far beyond what theſe plaintiffs want, for in that caſe the executrix had diſpoſed of the River *Lee* bonds, four years after the death of the teſtator. The bankers ſwore they knew nothing of the will, and they believed the bonds her own property, not that of the teſtator. If that caſe had been decided againſt the bankers, it would have furniſhed a ſtronger authority, than is neceſſary for theſe plaintiffs. Hitherto I have ſuppoſed the executor pretending no other authority than as executor; and that the other defendants relied ſolely upon his authority in that character; but the truth is, it was not upon his legal authority as executor, that they relied: but they proceeded, as they ſtate upon the faith of his repreſentation; by which they were induced to believe, that the property he aſſigned to them was actually his own; as the teſtatrix had left him every thing, ſubject only to 20l. a year, and a few ſmall legacies. This repreſentation is partly true, partly falſe. He was her reſiduary legatee; and it is taken for granted on all ſides, that ſhe had a right to diſpoſe of this property; but he was ſubject to ſomething more than 20l. a year, and ſome trifling legacies, viz. the claims under her huſband's will. This they would have ſeen, if they had looked at her will, inſtead of taking his repreſentation. They would have ſeen that he had no right to aſſign the ſtock, till the claims under that will were ſatisfied; and that ſome of thoſe claims were unſatisfied. Common prudence required, that they ſhould look at the will, and not

(*t*) It has ſince appeared, that though that point ended in a compromiſe, Lord *Thurlow* had formed his judgment upon it againſt the Bankers, 2 Dick. 724.

take the debtor's word as to his right under it. If they neglect that, and take the chance of his ſpeaking the truth, they muſt incur the hazard of his falſehood. The rights of third perſons muſt not be affected by their negligence. I do not impute to them direct fraud: but they acted raſhly, incautiouſly, and without the common attention uſed in the ordinary courſe of buſineſs; the reference in the will of Mrs. *Smith* to the will of her huſband, making it the ſame as if a legatee of her own was diſappointed by this. It was groſs negligence not to look at the will, under which alone a title could be given to them. It was not neceſſary to uſe any exertion to obtain information, but merely not to ſhut their eyes againſt the information, which without extraordinary neglect they could not avoid receiving. No tranſaction with executors can be rendered unſafe, by holding that aſſets transferred under ſuch circumſtances may be followed. For the defendants it is objected, that the plaintiffs were guilty of laches, in not taking ſteps to ſecure their legacies in the life of Mrs. *Smith*. But one was an infant when the bill was filed, and his legacy was not payable till her death; and though the plaintiff *Hill* might have filed a bill, it was not groſs negligence not to do ſo, for ſo ſmall an object. There was no reaſon to think that the fund was in danger; and upon inquiry, ſhe would have found ſtock ſufficient left to anſwer her legacy. Upon the whole, I am of opinion, theſe funds are liable to anſwer the demands of the plaintiffs."

Specific legatees have this advantage over *pecuniary*, viz. that they will not be compelled to abate upon a deficiency of aſſets to pay general legacies; but on the contrary, they have this diſadvantage, that if the ſpecific funds fail, they will be entitled to no contribution from the pecuniary legatees, nor to have the deficiency made up out of the general aſſets (*u*).

If all the perſonal eſtate not ſpecifically bequeathed, be exhauſted in ſatisfying part of the teſtator's debts, or if the teſtator in parcelling out the ſpecific fund among the legatees, exceed the amount of it by miſtake (*x*), the ſpecific legatees will be obliged to abate proportionably *inter ſe*.

(*y*) *A.* ſeiſed in fee of ſome lands and poſſeſſed of a leaſe for years in other lands, and being indebted by ſpecialty and ſimple contract, deviſed a rent-charge of 40l. a year, out of the leaſe for years to one grandſon, the leaſe itſelf to another grandſon, and *all* his lands in fee to *B.* and his family in ſtrict ſettlement. None of the deviſees were the teſtator's heir, and the will was

(*u*) Sleech *v.* Thorrington, 2 Vez. 561.—*Supra*. P. 24. (*x*) See the laſt caſe referred to. (*y*) Long *v.* Short, 2 P. Will. 403. Devon *v.* Atkins, 2 P. Will. 381.—3 S. P.

made since the statute against fraudulent devises (z).—There being a deficiency of assets to pay debts, the question was, whether they should be charged on the freehold or the leasehold estate? And it was decreed by Lord *Cowper*, C.—1st. That the devise of a rent-charge out of a term, was as much a specific devise, as if it had been of the term itself.—2dly. That the devise of a term for years was as much a specific devise as a devise of lands in fee, wherefore each being equally specific devises, it would, in this case be an equal disappointment of the testator's intent to defeat either, by subjecting it to the testator's debts.—3dly. That since the statute of fraudulent devises, lands in fee were equally subject to debts by specialty in the hands of of the devisee, as leases in the hands of the executor or legatee were to debts by simple contract at common law; so that to prevent the disappointment of the testator's intention, the court thought it reasonable, that the devisee of the fee-simple estate, and the devisees of the lease and annuity, should respectively contribute to the debts by specialty, in proportion to the value of the premises; but that as to the debts by simple contract, if there should not be enough besides to pay them, they should fall upon the leasehold premises only.—It was objected that the fee-simple lands ought to be more favoured, than any of the personal estate and leases, for that the latter had always been decreed to go in aid of the former, and therefore in this case the leasehold estate ought to bear all the debts by specialty, as far as it would extend: but this objection was over-ruled by the Lord *Chancellor*, for that it might utterly disappoint the testator's intention in providing for his grand-sons out of the lease; though his Lordship allowed, that if the devise had been to *B.* of all the rest of the testator's lands it would have been a residuary, not a specific devise, and the devisee should not have come in, till after the debts by specialty or otherwise had been paid out of his inheritance.

A case may happen in which specific legatees will be obliged to abate in favour of a pecuniary legatee. Suppose then a person possessing personal estate at *B.* and *C.* only, bequeath it specifically to *D.* and *E.* and then gives a legacy to *F.* generally, the personal estate at *B.* and *C.* will be liable to the payment of this legacy, as there never was any other fund out of which *F.*'s legacy could have been satisfied (a).

There have been cases in which some pecuniary legatees have claimed a priority of satisfaction to other legatees, so as not to abate in proportion with them upon a deficiency of assets. These cases, indeed, depended upon very special circumstances,

(z) 3 and 4 Will. and Mary, cap. 14. (a) By the Lord Chancellor in Sayer *v.* Sayer, Pre. Ch. 393.

viz. the particular ſituation and deſcription of the legatees, as of a wife or child unprovided for; or when the legacies were given in lieu of ſome other demand to which the legatees were intitled, as in ſatisfaction of dower, and the like; or when it was obvious from the whole will, that ſome pecuniary legatees were intended a preference to others; thus,—

(*b*) *A.* having a wife and two children, bequeathed an annuity of 120l. to his wife for life, payable half yearly, ſubject to limitations over, if he had a ſon, &c.; he afterwards directed his executors to purchaſe, if they could, the annuity of 120l. in government ſecurities of 99 years, or ſome other longer term: but if they could not do that, then to purchaſe lands of 200l. a year value, to be ſettled ſo as that the annuity ſhould be to his wife, free from taxes, with remainders over. He directed that if he ſhould leave any child living at his death, his executors ſhould out of the profits of the reſidue of his eſtate, pay to his wife 30l. *per annum*, for the maintenance of ſuch child. He gave legacies to ſome collateral relations and friends, and all the reſidue of his eſtate, both real and perſonal, he ordered to be put out to and for the beſt advantage of all his children at his death, equally, to be paid them at their reſpective ages of 21, or marriage. Bill by the wife for payment of her annuity and arrears, inſiſting, that though on a deficiency of aſſets, the general principle was againſt her, whoſe annuity would abate in proportion with other legatees, according to later determinations; yet conſidering the perſons for whom this proviſion was deſigned, a wife and children, and the particular manner in which it was given by the will, it ought not upon the deficiency to ſhare the fate in common with the other pecuniary legatees. That this annuity was in the nature of a ſpecific legacy, for that was not confined to what is called an individual legacy, exiſting among the teſtator's property, at the time of his death, but included alſo, any thing to be purchaſed by his executors. That the other parts of the will ſhewed, he intended this proviſion ſhould be clear of any deduction whatever. And that he had made two reſidues, firſt, where he directed the maintenance out of the profits of the reſidue, which conſtituted a remainder of the perſonal eſtate, after firſt taking out this annuity, or the fund to purchaſe this annuity, and then a ſecond or general reſidue, after taking out the intermediate legacies. For the *defendant* it was inſiſted, that this was no ſpecific legacy in any point of view, not being a deviſe of any thing the teſtator had or intended to have during his own life: but a general deviſe of a ſum of money out of his

(*b*) Lewin *v.* Lewin, 2 Veſ. 415. See Lord Hardwicke's comment upon this caſe in Blower *v.* Morret, *infrà*.

perſonal eſtate, to be laid out to particular purpoſes: nor had the court ever from a form in which the legacy was to be enjoyed, conſidered it as ſpecific: nor had a wife or children any preference ſo as not to abate in proportion with other legatees. In *Brown* v. *Allen*, 1 *Vern.* 21, was a very ſtrong circumſtance to ſhew the teſtator's intent to prefer one legatee to the others, yet upon a deficiency, he abated in proportion. That this was not to be conſidered as two reſidues of his eſtate, but as one, and amounted only to this, that after this annuity, he had directed maintenance for his children out of the general reſidue of his eſtate; then gave pecuniary legacies, and then directed what ſhould be done with the principal or capital, if any, which he did not intend to be divided among them until 21 or marriage. Lord *Hardwicke*, C. "All theſe teſtamentary cauſes depend on the particular penning of the will or teſtament, and the intent ariſing, which is to be collected out of the words of the teſtator, and the order in which he has placed them. It is certain, that the placing the words or clauſes in a will in different orders, does often not induce the court to make a conſtruction to vary the intent of the teſtator, but that notwithſtanding the clauſes are placed out of time in the will, the general rules ſhall prevail, as the court ſtill lets ſuch rules prevail on the whole, though wills are commonly inaccurately made, teſtators being conſidered as *inops conſilii*. But this is a very ſtrong caſe to ſhew, that this annuity, and the fund for it, were intended by the teſtator to be preferred to all the other legacies in the will. It is not ſuggeſted, that either the wife or children have any other proviſion; and when a man is ſo ſituated, as he was, and (as appears from other words in the will) having a proſpect of more children, and no proviſion by ſettlement or otherwiſe, under which his wife or children could claim, it was natural for him in making a diſpoſition of his eſtate ſo to give it, that their proviſion ſhould be in the firſt place, and not to abide by the contingency of his eſtate, producing more or leſs at the time of his death, and of ſharing in proportion with others, ſtrangers in blood, though friends to him, or collateral relations, to whom he had given legacies: it was natural, he ſhould not intend, they ſhould abide by that event, though that is the general rule of law. As to *annuities*, whether to be conſidered as ſpecific legacies, there have been caſes in this court, in which annuities in general have been ſo conſidered, becauſe it is a direction of the teſtator, that his perſonal eſtate ſhould be a fund to anſwer that. I believe, the firſt caſe in which that was broke in upon, was by Sir *Joſeph Jekyll*, when he was firſt *Maſter of the Rolls*, in *Alton* v. *Medlicot*, where there was not a gift, but a direction in the will to lay ſo much out of the perſonal eſtate to purchaſe an annuity, which he held a pe-

cuniary legacy, and to abate in proportion. Afterward the court conſidered, that the diſtinction was extremely nice between ſuch a direction in the will, and a gift in the will of that annuity out of his perſonal eſtate; that in ſenſe and reaſon it amounted to the ſame thing; therefore, and as the court endeavours to favour equality, there has been ſince, I believe, a determination, that even an annuity by will, out of perſonal eſtate, by way of direct deviſe or legacy, ſhould abate in proportion with pecuniary legatees; but ſtill that is only in general caſes; for the intent of the teſtator on the conſtruction of the will, muſt be followed; if he prefers ſuch annuitant before other legatees. This caſe is very ſtrong, for that; for it is natural, that his wife and children ſhould have this out of his eſtate, before the gift to ſtrangers; and, as appears to me, he has expreſſed that. There certainly may be caſes wherein ſuch a conſtruction may be made, as the defendant's counſel inſiſt upon as to theſe reſidues: but the queſtion is, whether that was his intent? To find out which, conſider the conſequence, it is this; that I muſt preſume he intended the whole maintenance for his children at the time of his death, ſhould depend on this contingency; whether there would be any ſurplus after purchaſe of this annuity, the whole of which was to go to the wife for life, and after all theſe pecuniary legacies to collateral relations; which were merely voluntary in him, he not being under obligation to make proviſion for them, as he was for his children. I am of opinion, that is an unreaſonable conſtruction, and contrary to the intent. It is ſaid, there are caſes, wherein the court has gone a great way to level legatees, and make them abate in proportion, as in *Brown* v. *Allen*. I do not remember the ſtate of that caſe, and there may be a difference in the ſtate of it; for if the teſtator ſays, "Imprimis," or, "in the firſt place, I give ſuch a legacy," that amounts only to the order in which he expreſſes his gifts in the will; to nothing more. But if he had ſaid, "to be paid in the firſt place" and it had been in that caſe a proviſion for a wife, I ſhould have doubted of that determination, and ſhould have inclined to think, it was a declaration of his intent, that that proviſion for his wife ſhould come out of the perſonal eſtate, and be paid in the firſt place, becauſe there is ground for that from the preference to a wife and children unprovided for. If, indeed, in that will, they all ſtood in equal degree, it was ſufficient ground for the court not to preſume a preference, but if it was a proviſion for a wife or child unprovided, that is different: but this is a ſtronger caſe from the other obſervation. I am of opinion, therefore, that this annuity muſt be preferred."

(c) *B.* having a wife and two daughters, bequeathed 3,400l.

(c) Burridge v. Bradyl, 1 P. Will. 127.

to be laid out by his executors in the purchaſe of annuities in the exchequer for 99 years, to be enjoyed by his wife for life, *ſhe releaſing her dower*, and after her death, to go equally to his two daughters; and he gave 1000l. a-piece to his two daughters, payable at 21, or marriage, and died, leaving aſſets little more than ſufficient to pay the 3,400l. which were to be laid out in exchequer annuities. It was ſaid, that all the legacies being pecuniary, and there being a deficiency of aſſets, they muſt all come into average and ſuffer alike; that equality was the higheſt equity: and it would be very hard if the wife, who might marry again, ſhould go away with all, ſo that the children in her life might be without ſubſiſtence. And by Lord *Cowper*, C. "The 3,400l. ſhall have the preference, and if there be not aſſets enough to pay the other legacies, they muſt be loſt. It is of ſome weight that theſe annuities are to go to the children after the wife's death, but eſpecially as the wife is a *purchaſer* of the annuities for her life, by her releaſing her dower; and for that money ordered by will, or articled to be laid out in an annuity, or in land, is in equity looked upon as an annuity or land, and conſequently to be taken for a ſpecific deviſe; it is therefore to be prefered before a pecuniary legacy (*d*)."

(*e*) *C.* deviſed lands to truſtees to be ſold for the payment of debts, legacies, &c. and gave to his wife a general legacy of 500l. in theſe words, "to be paid her immediately after my deceaſe, out of the firſt money belonging to me, that ſhould be got in after my death, and it is my further will, that my wife ſhall be entitled to the ſeveral legacies given to her in full ſatisfaction, bar and diſcharge of all dower or thirds, which ſhe might be otherwiſe intitled to out of my real and perſonal eſtate." It was inſiſted that this 500l. ſhould not abate with the other legacies, from the particular directions attending it; it being given to the wife for her better ſupport and maintenance, and intended as a proviſion for a wife which was always favoured; and that this conſtruction did not break in upon any rule of law, the diſpute not affecting creditors, but legatees. That the teſtator had clearly given a preference to this legacy, by directing it to be paid immediately, which would therefore carry immediate intereſt, if enough to anſwer all: whereas other legatees would not be intitled to intereſt until a year after the teſtator's death. That this legacy was given in compenſation for dower, and *Burridge* v. *Bradyl* (*f*) ſhewed, that cauſes of this kind have had weight: And by Lord *Hardwicke* C. "Caſes of this kind, of a claim by pecuniary legatees of a priority of ſatisfaction, ſo as not to abate in proportion with

(*d*) *Sed vide* Hinton *v.* Pinke, and Hume *v.* Edwards, *infrà*; and Lord Hardwicke's obſervations in the next caſe. (*e*) Blower *v.* Morret, 2 Veſ. 420. (*f*) Laſt caſe.

others, ſeldom come before the court, and there are fewer in which the court has given way to claims of that kind, there muſt be therefore very ſtrong words to induce the court to give way to it; for in moſt caſes the court has diſclaimed the laying weight on particular words, as the ſaying, *imprimis*, or *in the firſt place*, or a direction for the time of payment. All theſe are always diſclaimed, and that upon juſt and ſolid reaſon, becauſe if the court was upon ſuch grounds to give a preference to one pecuniary legatee, there would be no end of it, conſidering the variety of expreſſion, and the incorrectneſs with which wills are frequently drawn; and therefore in *Brown* v. *Allen*, 1 *Ver.* 31. the court did not lay weight on a direction of that kind. Yet there may and have been ſome caſes in which the court has thought the intent of the teſtator ſtrong enough for it; one of which came very lately before me, *Lewin* v. *Lewin* (*g*); the governing reaſon in which caſe was, that the teſtator had conſtituted two reſidues of his eſtate; the firſt to be computed after taking out the money for the purchaſe of the annuity to his wife; the other to be computed after taking out the money to the pecuniary legatees: but there is nothing of that in this caſe. This 500l. legacy affects the perſonal as well as the truſt of the real eſtate; but the direction *to be paid*, &c. is not ſufficient to give her a preference: for that only relates to the time of payment. He directs, that whereas the general rule of law is, that legacies ſhould not be paid until a year, this ſhall be paid immediately. The conſequence is, that if it is not then paid, it ſhould carry intereſt immediately, which is always conſidered as a compenſation for delay of payment, and puts her in the ſame condition as if it were paid. If, therefore, he had directed ſeveral different times of payment to ſeveral legacies, it might be as well ſaid, that thoſe given payable ſooner after his death than others, ſhould not abate in proportion. Then the other words *out of the firſt money*, &c. are only conſequential to the direction, that it ſhould be paid immediately; they are of no operation, and only a farther explanation of his intent: but ſtill all the legatees muſt abate in proportion, whatever time of payment the teſtator has directed, for that will make no difference in right or in preference. But the moſt material point inſiſted on for the plaintiff, is the clauſe as to dower. That may depend on ſome facts. There is to be ſure ſome colour and reaſon, that a man giving a legacy or proviſion for his wife, may have an intent to prefer her, becauſe it is a duty he owes to nature; and ſo of children: whereas, the others are out of mere voluntary bounty or favour. If the wife was at the time of making the will, intitled to any dower or thirds out of the teſtator's eſtate, I am of opinion ſhe would be intitled to a pre-

(*g*) *Supra.*

ference, and that upon the ground Lord *Cowper* went in *Burridge* v. *Bradyl*, that the teſtator by ſetting a price upon her dower, if ſhe thought fit to take it, it became a purchaſe of her dower. So in a deviſe of an eſtate for payment of debts and legacies, out of which the wife was intitled to dower, the teſtator might ſet a price thereon, if ſhe ſhould think fit to take it. The reaſon Lord *Macclesfield* was not ſatisfied with this caſe, when cited in *Hinton* v. *Pinke*, 1 P. Will. 539. was, becauſe according to the book, there was a wrong ſtate of it, barely as if it was a gift of money, to be laid out in land, without ſtating the circumſtance that it was given to purchaſe an annuity for the wife, ſhe releaſing her dower, which was the true foundation of that determination; for I lay no weight on what is mentioned beſide by Lord *Cowper*, as of ſome weight, that the annuities were to go to the children after the wife's death; for that was only as to the hardſhip; nor that it was directed to be laid out in land; which will not vary the caſe; for it is ſtill a pecuniary legacy, and muſt then abate in proportion. The ſtrong ground was, that it was a purchaſe of the wife's dower, by giving her a ſum of money in lieu and ſatisfaction of and upon her releaſing it: and the wife may lay hold of that, if ſhe will. It is the ſame as if a teſtator ſays, "I give *A.* 500l. on conſideration that he conveys ſuch an eſtate to my deviſee or truſtee." *A.* has then an option to ſay, that is a contract; he cloſes therewith, and makes it abſolute; and will part with that eſtate for that money; and is not bound to abate in proportion with other legatees. So is this a purchaſe from the wife, and the price fixed by the huſband, provided there was any thing to purchaſe; which depends on a fact, whether the wife would be intitled to dower, and had a title inchoate to dower out of his real eſtate; for if ſhe had a jointure in bar of dower, before the making the will, I ſhould not then conſider it as a purchaſe, but only as a cloſing every thing; and the words are only of courſe, and amount to nothing, if ſhe was not intitled to dower."

(*h*) *D.* bequeathed an annuity of 100l. to his wife for life, to be paid out of his freehold eſtate at *S.* and alſo the uſe of his houſe there, together with all the furniture and linen: he alſo gave 500l. to her, which together with the annuity he declared to be in full of what ſhe ſhould or might claim for dower, or thirds out of his real or perſonal eſtate. There was a deficiency of aſſets to pay debts and legacies, and the queſtion was, whether the 500l. ſhould abate with the other legacies? And Sir *Thomas Clarke*, M. R. ſaid, two arguments were uſed why the 500l. ſhould abate;—1ſt, the words *in full of dower*,

(*h*) Davenhill v. Fletcher, Ambl. 244.

&c. were inſerted not to give the wife an advantage, but to ſignify, ſhe ſhould not have both dower and the legacies; and as the 500l. would abate without thoſe words, ſo it ought even with them.—2ndly, that the legacies were more than her dower, and therefore the 500l. ought to abate: His Honour obſerved, that there was ſome weight in the obſervations, which would deſerve conſideration, if it were *res integra*. But there were two authorities ſtrong againſt them. In *Burridge* v. *Bradyl* (*i*), the wife was directed to releaſe; which, though it imported an act to be done, yet was not more than ſuch a declaration: for by acceptance of the legacy, ſhe was barred, and the heir had a right to a releaſe. That the caſe of *Blower* v. *Morret* (*k*), was ſtill ſtronger, being in the words uſed in the preſent caſe, and there the court directed the Maſter to inquire whether the wife was intitled to *any* dower, and if ſhe were, declared ſhe ſhould have the legacy without abatement.

(*l*) *E.* having two ſons and a daughter, gave by his will, (of which he made his wife executrix) 2000l. a-piece to his two ſons, and 2000l. to his daughter, to be paid at 21 or marriage; with a proviſo, that if his aſſets ſhould fall ſhort, in payment of theſe legacies, yet the daughter ſhould be paid her full legacy, and that the deficiency ſhould be borne proportionably, out of the ſons legacies only. The teſtator left ſufficient property to diſcharge all the legacies, but the executrix waſted the aſſets, and on that account alone, the deficiency was occaſioned; and it was determined by the Lord *Chancellor* on appeal, from a decree at the *Rolls*, contrary to, and in reverſal of that decree, that there was a plain preference given to the portion of the daughter before thoſe of the ſons, and that the event which had happened, was within the words, the eſtate having actually fallen ſhort to pay the legacies. That as the teſtator had not reſtrained it to any particular means, by which the aſſets ſhould fall ſhort, it was to be taken generally, viz. *if by any means*, there ſhould be a deficiency, for ſtill the injury was the ſame to the daughter, whom the father ſeemed in all events to have provided for, with a portion of 2000l. Suppoſe, ſaid his lordſhip, the eſtate had, after the teſtator's death, fallen ſhort, from a loſs by fire, or by a bad title, upon which money had been lent, neither of which could have been foreſeen by the teſtator, ſurely both theſe accidents would come within the proviſion of the will, and the daughter ſhould have her full portion of 2000l.; that it was the ſame thing as if the teſtator had ſaid, his daughter's portion ſhould be paid *in the firſt place*, and the conſtruction which the other ſide would put upon this clauſe, was to make no diſtinction, where the

(*i*) *Supra.* (*k*) *Supra.* (*l*) Marſh v. Evans, 1 P. Will. 668.

that legacies given to executors and truſtees for their care and pains in executing the truſts of wills, ſhould abate with the other legacies upon a deficiency of aſſets; which deciſion was approved by Lord *Hardwicke* in *Heron* v. *Heron* (*r*).

In that caſe the executors had each 100l. given them for their trouble, in looking after the eſtate, and the queſtion was, whether they ſhould abate with the reſt of the legatees, the perſonal eſtate being deficient to anſwer the whole? The *Attorney General* mentioned the caſe of *Newton* v. *Haughton*, at the *Rolls*, 31 Oct. 1734, to ſhew that the executors ought to retain their legacies without making any abatement: But Lord *Hardwicke*, C. "The caſe of the *Attorney General* v. *Robins*, is directly contrary to this reſolution, and determined ſo by the very ſame judge Sir *Joſeph Jekyll*, about twelve years before the caſe of *Newton* v. *Haughton*. There is another caſe in 2 *Vern.* 434. called *Fretwell* v. *Stacey*, which is alſo differently determined: 'a legacy given to executors for care and pains; if a deficiency of aſſets, they muſt abate in proportion with the other legatees.' I muſt own theſe two laſt, fall in with my own opinion, much more than the latter caſe. For where legacies are given to executors for their care and pains, I am very unwilling to diſtinguiſh them from common legatees, becauſe where the words *care* and *pains* are expreſſed in the will, or whether it is given generally without theſe words, it intirely depends upon the whim of the drawer of the will, and is ſtill but a legacy, and not more ſo than any other, and therefore there ought not to be ſuch a diſtinction as the *Attorney General* contends for, upon ſuch ſlight grounds. Beſides it would be attended with great inconveniences: therefore, let the executors abate in proportion with the reſt of the legatees."

It was further reſolved in the *Attorney General* v. *Robins* (*s*), that legacies given to *ſervants*, were liable to the ſame rule of abatement.

Legacies given to creditors who had compounded with the teſtator for their debts, and accepted leſs than the amount of them, will not be exempt from abatement upon a deficiency of aſſets, as ſuch creditors are to be conſidered in the light of *voluntary legatees* only.

(*t*) *A.* By his will, gave ſeveral conſiderable legacies, and then proceeded as follows, "whatſoever ſhall remain in money, lands and goods, I give the ſame to my brother *J. Coppin*, who thereout is to pay what I owe to my creditors at *Aleppo*, who have been ſo kind as to compound my debts with me at

(*r*) 2 Atk. 161, 171. (*s*) *Supra*. (*t*) Coppin *v.* Coppin, 2 P. Will. 292, 293, 296.

10s. in the pound, and they to be paid without intereſt." After which, he made the defendant *J. Coppin*, his executor and reſiduary legatee. There being a deficiency of aſſets, the bill was brought by the compounding creditors, upon a ſuggeſtion that their demands being originally debts, and what the teſtator thought in his conſcience he was ſtill obliged to pay, they continued to be debts in a conſcientious view, though in law releaſed, and therefore were ſuperior in their nature to legacies, for which reaſon they prayed that theſe might have the preference in payment, inſiſting further it was not material that thoſe debts were in law releaſed, if the teſtator thought them debts in conſcience, and would not take the advantage of the releaſe made to him by his creditors, which he was not bound to do. But the court thought that the compounding creditors having once releaſed their debts, which were thereby become extinct, they were out of the caſe as creditors, and muſt now claim as voluntary legatees, and could have no other title than to legacies in ſuch manner as given by the will. That the teſtator might eaſily and by expreſs words have given them the preference, if he had ſo intended; but it would be dangerous to make a conſtruction beyond the words of the will, that being to make a new will for the teſtator; that if one gives a legacy to a *charity* (*u*), it is not to be preferred to other legacies, unleſs expreſsly ſo directed by the will.

Bequeſts of money to be inveſted in the purchaſe of lands or annuities, are general legacies, and therefore muſt abate with pecuniary legatees; Thus,—

(*x*) *A.* among other legacies, gave 1500l. to her eldeſt ſon, in truſt to lay it out in a purchaſe of lands in fee, and to grant a rent-charge of 50l. per annum thereout, to his daughter the plaintiff *Mary*, wife of the plaintiff *Hinton*, for her ſeparate uſe. But if he refuſed or neglected to lay out 1500l. in a purchaſe, and to grant this rent-charge, then he was to have but 500l. of the money, and the remaining 1000l. was to be laid out in the purchaſe of an annuity, as far as it would go, for the ſeparate uſe of the daughter. There being a deficiency of aſſets, the queſtion was, whether the 1500l. legacy, or at leaſt the annuity of 50l. ſhould abate in proportion. It was objected that it ſhould not, becauſe it was ordered to be laid out in land, and conſequently to be taken as a deviſe of land, by which means it became a ſpecific deviſe, as had been decreed by Lord *Cowper* in *Burridge* v. *Bradyl*, and as it was land, it was of a different nature, for it would deſcend to the heir, &c. To which it was anſwered, that the legacy was money; and if money be deviſed to put one out an apprentice, or an an-

(*u*) *Supra.* (*x*) Hinton v. Pinke, 1 P. Will. 539.

nual payment be deviſed out of a perſonal eſtate, theſe, on a deficiency, ſhould abate with the other legacies. And by Lord *Parker*, C. "I agree this 1500l. legacy ſhall be taken as land, but what the legacy is, or how much is to be laid out in land, is the queſtion? The legatee of the 1500l. cannot ſay he has a right to the 1500l. in ſpecie; indeed if the money in ſuch a hand were deviſed, this would be a ſpecific legacy: a ſpecific legacy is, where by the aſſent of the executor, the property of the legacy would veſt. As there is a benefit one way to a ſpecific legatee, I mean, that he ſhall not contribute; ſo there is a hazard the other way; for inſtance, if ſuch ſpecific legacy being a leaſe, be evicted, or being goods, be loſt or burnt, or being a debt, be loſt by the inſolvency of the debtor, in all theſe caſes, ſuch ſpecific legatee ſhall have no contribution from the other legatees, and therefore ſhall pay no contribution towards them. Is it poſſible, ſuppoſing there were in the preſent caſe 1500l. of the teſtator's money laid upon the table, that the plaintiff the legatee ſhould ſay, I have a right to this very money in ſpecie, if not, then it is no ſpecific legacy. But the will ſaying, that in caſe of the ſon's refuſing or neglecting to make this purchaſe, then he is to have but 500l. of the 1500l. legacy, and the daughter to have the remaining 1000l. therefore I take the daughter to be a legatee for 1000l. which is to abate, in proportion, and as far as it will go, to be laid out in an annuity for the plaintiff, the daughter, for her life, and for her ſeparate uſe." His Lordſhip ſaid, that though he could not come into the reſolution of Lord *Cowper*, in the caſe of *Burridge* v. *Bradyl* (*y*), yet if it were inſiſted on, he had ſuch a regard for the precedent as cited, that he would ſee the decretal order, but this not being inſiſted upon, it was decreed as above.

(*z*) This cauſe came before the court upon a petition, and a queſtion aroſe, whether upon a deficiency of a teſtator's aſſets to pay all the legacies, a deviſee of an annuity for life, charged upon the perſonal eſtate, ſhould abate in proportion with other legatees, or whether he ſhould be conſidered a ſpecific legatee, and conſequently not liable to abate? And Lord *Hardwicke*, C. ſaid, that the caſe of *Alton*, executor of General *Pepper* v. *Medlicot*, was an authority in point, that an annuitant for life on the perſonal eſtate muſt abate in proportion with other legatees, and is not to be conſidered as a ſpecific legacy.—'General *Pepper*, by his will, gave *A.* 140l. out of his perſonal eſtate, to purchaſe an annuity of 20l. for life, if ſhe continued in his ſervice, and if that ſhould not be ſufficient, his executor had

(*y*) See Lord Hardwicke's obſervations upon this caſe, in Blower *v.* Morrett, *ſuprà*. (*z*) Hume *v.* Edwards, 3 Atk. 693.

directions to advance her a further ſum to purchaſe this annuity. Upon a deficiency of aſſets, it was inſiſted that *A.* ſhould abate in proportion with the other legatees; Sir *Joſeph Jekyll* was of that opinion, and ordered that ſhe ſhould abate upon the whole ſum of 140l.'—His Lordſhip upon the authority of this caſe, decreed that the annuitant ſhould abate in proportion with the legatees.

It has been decided, that pecuniary legatees upon a waſte of aſſets, ſhould not be paid the full amount of their legacies, to the diſappointment of a reſiduary legatee, but that they and the reſiduary legatee, ſhould abate *pro ratâ*;—the caſe alluded to was as follows:—

(*a*) *A.* having a ſmall real eſtate, but a perſonal eſtate amounting to nearly 20,000l. bequeathed 3000l. a piece to his two younger ſons, and the ſurplus to his eldeſt ſon, and made his wife executrix and guardian to his children. It appeared that the bulk of the teſtator's perſonal eſtate conſiſted of a few *items*, viz. in *Eaſt India* ſtock, bank ſtock, and money in the government funds. The wife married *L.* who converted great part of the teſtator's perſonal eſtate, and went beyond ſea. The two younger ſons filed a bill for their legacies; and it was urged that it would be hard upon the eldeſt ſon, to whom the father intended to be moſt bountiful, if he muſt be poſtponed to his two younger brothers, by their being firſt paid their legacies with intereſt, before he ſhould come in for any thing. And Lord *Cowper*, C. "Let the maſter take an account of what was the clear perſonal eſtate of the teſtator, at his death; and this perſonal eſtate lying in a narrow view, and conſiſting chiefly but of few *items*: his Lordſhip was of opinion, that the teſtator muſt, at the making of his will, know what his ſurplus would amount to, after his debts and legacies paid; and that he meant this ſurplus as a legacy to his eldeſt ſon: wherefore he declared it ought to be looked upon as ſuch; and directed, that the maſter ſhould compute intereſt as well for what was the ſurplus of the teſtator's perſonal eſtate at his death, for the eldeſt ſon, as for the two legacies of 3000l. a piece to the two youngeſt ſons; and if any of the three ſons had received any part of the perſonal eſtate of the father, the other two were in the firſt place, to receive as much, ſo as to put them all upon an equality, and afterwards all the three ſons were to receive *pari paſſu*, in reſpect of the value of the ſurplus given to the eldeſt ſon which was to be taken as a legacy, and in regard to the legacies of 3000l. each to the two younger ſons.

(*a*) Dyoſe *v.* Dyoſe, 1 P. Will. 305.

The authority of the laſt caſe has been queſtioned by Lord *Thurlow*, in *Fonnereau* v. *Poyntz* (*b*); his Lordſhip expreſſed himſelf to the following effect;—"As to the caſe of *Dyoſe* v. *Dyoſe*, there was no ambiguity, either latent or patent: there was a legacy of 3000l. a piece given to the younger ſons, the reſidue to the eldeſt, and the queſtion was, whether the reſiduary legatee ſhould have any thing or nothing, which if not mixed with the affair of the executrix having waſted the aſſets of the teſtator, is a ſimple queſtion, whether a teſtator giving a larger legacy than he is worth, and then the reſidue to another, there could be a reſidue. I cannot agree to the law of that caſe; for in ſuch a caſe, if the teſtatrix did not leave a reſidue beyond the value of the legacies, the reſiduary legatee takes nothing; ſo where the pecuniary legatees abate *inter ſe*, the reſiduary legatee takes nothing; and the law of the court is, that the intention of the teſtatrix's making a ſpecific bequeſt, or a pecuniary legacy, cannot be controlled by the ſtatement of her fortune."

If a freeman of London make his will, and diſpoſe of his whole eſtate, without noticing the cuſtom; and give ſeveral ſpecific and pecuniary legacies, and deviſe the *reſiduum* to *A.* and the widow waiving her legacy, claims a moiety of his perſonal eſtate by the cuſtom, if the reſidue be ſufficient to anſwer her moiety or ſhare, it ſhall be taken out of the reſidue, but if that fall ſhort, then the pecuniary legatees ſhall abate in proportion; and if the reſidue with the pecuniary legacies be ſufficient to ſatisfy her cuſtomary ſhare, the ſpecific legatees ſhall not be obliged to contribute, but will be allowed to enjoy their legacies intire (*c*).

(*b*) 1 Bro. CC. 478, *infrà*. Alſo Pre. Ch. 401—S. P. (*c*) By Lord Parker, C. in Kitſon v. Robins, 8. Vin. Ab. Tit. "Deviſe," p. 423, pl. 37.

CHAP. X.

Of Lapſed Legacies.

IT is a general rule that if a legatee die in the life of the teſtator, the legacy given him ſhall lapſe or fall into the general perſonal eſtate of the teſtator; and it will not alter the rule though the legacy be given to the legatee his *executors* or *adminiſtrators*, and parol evidence to ſhew, that the teſtator was appriſed of the legatee's death when he made the will cannot be admitted.

(*a*) *B.* was indebted to *A.* 400l. by recognizance; and afterwards *A.* bequeathed to *B.* his executors, adminiſtrators, and aſſigns, the 400l. which he owed her, together with all intereſt due for the ſame, provided he paid out of the 400l. ſeveral legacies to his children, amounting to about 150l. and the reſidue of the 400l. ſhe gave to *B.* his executors, adminiſtrators, and aſſigns; and ſhe deſired her executors not to claim or meddle with the 400l. but freely to deliver up the ſecurity for the ſame, into the hands of *B.* his executors, adminiſtrators, and aſſigns, and ſeal and execute to him and them, ſuch reaſonable releaſes and diſcharges, and acknowledge ſatisfaction for the 400l. for the ſafety of *B.* &c. as *B.* &c. ſhould think fit.—*B.* died in the life of the teſtatrix, and the plaintiff, the heir of *B.* filed the bill againſt the executor of *A.* to be diſcharged from the recognizance. Upon which the queſtion was concerning ſo much of the 400l. as was given to *B.* after payment of the legacies to his children, whether that was not a lapſed legacy? And *firſt*, it was agreed by the court and the counſel, that where a legacy is given to a man, his *executors*, *adminiſtrators*, and *aſſigns*, if he die before the teſtator, the legacy will be loſt, although executors are named; for the words, *executors*, *adminiſtrators*, and *aſſigns* are void, being ſurpluſage only, and they are by ſuppoſition of law named to take in ſucceſſion only, and by repreſentation in the manner an heir repreſents his anceſtor; and to this purpoſe *Brett* and *Rigden*'s caſe was cited, *Plowd.* 340, where lands being deviſed to a man and his heirs, and the deviſee dying in the life of the teſtator, it was held, that the deviſe was void, and the heir could not take; conſequently if the queſtion had depended upon this clauſe, the legacy had been loſt.—*Secondly*, it was held that a will might be ſo framed, that

(*a*) Elliot *v.* Davenport, 1 P. Will. 83.

though the legatee might die before the teſtator, yet his executors ſhould have the legacy; but that it ought to appear in the will plainly, and by direct words that the teſtator ſo intended, and then, although a will could not enure as a releaſe, even ſuppoſing it to be ſealed and delivered, becauſe it did not take effect in the teſtator's life, yet if it were expreſſed to be his intention that the debt ſhould be diſcharged, the will would operate accordingly. *Cowper*, Lord *Keeper*, therefore ſaid, that if this queſtion had depended upon the latter clauſe only, viz. that this ſecurity ſhould be delivered up to *B.* his executors, adminiſtrators, or aſſigns, it would have been an abſolute diſcharge of the debt, although the teſtatrix had ſurvived the legatee. So that the queſtion was reduced to this,—whether the latter clauſe was to be taken as diſtinct from, or independent of the former, in which caſe the legacy would ſubſiſt; or whether it ought to be looked upon as ancillary to, and dependent upon it, viz. if the legacy took effect, then, and then only, the executor in conſequence of it, was to releaſe. And his Lordſhip decreed that the latter clauſe was dependent upon the former, and therefore, that the legacy being lapſed upon the former clauſe, the latter did not prevent it. That what made ſuch conſtruction appear more reaſonable, was, that the like clauſe, in much the ſame words, was added to the other legacies given by the ſame will, which could not operate by way of releaſe or extinguiſhment; and though it might be the intent of the teſtatrix, that the executors of the legatee ſhould have the benefit of the legacy, as probably this was always the intent where a legacy was given to a man, his executors, &c. yet the law being otherwiſe, ſuch intent muſt not prevail; for which reaſon, a will that deſigned to prevent the lapſing of a legacy, by the death of the legatee in the life of the teſtator, ought to be ſpecially penned.—His Lordſhip therefore declared, that the laſt clauſe in the will, whereby it was directed that the ſecurity ſhould be delivered up to *B.* his executors, adminiſtrators, or aſſigns, and that no uſe ſhould be made thereof, was only in aid of the firſt clauſe in the will, by which alone the ſum was to be taken as a lapſed legacy.

(*b*) *A.* the teſtator, whoſe father was indebted to *Maybank*, left a legacy of 850l. exactly equivalent to the debt, to *Maybank*, his executors, adminiſtrators, or aſſigns. *Maybank*, at the time of the legacy given, was dead, but of this no notice was taken in the will. The perſonal repreſentative of *Maybank* filed a bill for the legacy, inſiſting that the words of the will, "his executors, adminiſtrators, or aſſigns," made the ſame tranſmiſſible; that it was the ſame as if he had ſaid, "And if he ſhall be dead,

(*b*) Maybank *v.* Brooks, 1 Bro. CC. 84.

I give the ſame to ſuch perſon or perſons, as ſhall be his executor, adminiſtrator, or aſſign, &c." And that he meant the legacy to go to the family of *Maybank*, in payment of the debt. —The original debt was not otherwiſe proved in the cauſe than by the recital in the will. But the plaintiff propoſed to read parol evidence of the teſtator's knowledge, that *Maybank* was dead, and his intent that it ſhould go to ſuch perſon as ſhould be his repreſentative. The evidence was that of an attorney then dead, who did not draw the will, but gave the teſtator a draft of a will, and ſwore he believed the teſtator had copied the ſame, the will being all in the hand-writing of the teſtator. The production of this evidence occaſioned ſome altercation, and two objections were taken. The firſt related to the practice of the court, and the ſecond was, that the evidence went to contradict the words of the will, and *Brown* v. *Selwin*, Ca. temp. Talbot, 240, was cited.—Lord *Thurlow*, C. "The only fact to which evidence is offered, is that the death of *Maybank* was within the knowledge of the teſtator. The end to which it is to be read, is, that the legacy was meant to be tranſmiſſible, that could not be from a legatee, who had been dead ſeveral years. But it is argued at the bar, that the legacy will amount to this: I give to *Maybank*, whom I know to be dead, if he ſhall be alive, but if he ſhall be dead, to his executors, and adminiſtrators; or, ſtill more abſurdly, to his aſſigns. It is argued at the bar, that evidence may be read to raiſe, as well as to diſſolve an ambiguity in a will: this is good law, for it muſt be raiſed by evidence. It has gone ſo far as to give the legacy to a certain perſon, where there was no ſuch perſon in exiſtence, as was deſcribed in the will; as to *John a Style*, where there was no ſuch perſon, but the teſtator uſed to call a certain perſon *John a Style*. All the caſes of the admiſſion of parol evidence are ſhort of this. I muſt accordingly decree the legacy to *Maybank* to be lapſed."

(*c*) *C.* bequeathed the reſidue of his eſtate and effects to his truſtees, to be placed at intereſt, and directed the intereſt to be paid to his wife for life, and at her death he gave 2,000l. part of the principal, to his niece *Elizabeth Cooper*, or to her proper repreſentative in caſe ſhe ſhould not be living at the deceaſe of his wife. He alſo gave to each of the children of his ſiſter *Elizabeth*, viz. *John*, *Dorothy*, *William*, and *Chriſtopher*, or their repreſentatives or repreſentative, the ſum of 2000l. Queſtion, whether *John*'s legacy of 2000l. ſhould go to his repreſentatives or lapſed, he having died before the teſtator. And by the *Maſter of the Rolls*: "As to the legacy to *John Barker*, I think the queſtion can hardly be raiſed upon this will; for ſee the

(*c*) Corbyn *v.* French, 4 Veſ. Jun. CC. 418—435.

preceding legacy to *Eliz. Cooper*: would not that have lapsed, if *Elizabeth Cooper* had died in the life of the testator. Beyond all question it would. It is nothing more than saying, it shall go to her representatives, if she dies before his wife. As to the others, I am of opinion, it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial interest to them; and must as such vest in them before it could be transmissible. The rules, upon which the court proceeds, are perfectly established. A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or to his representatives, it can mean any thing, but in case of his death in the life of the testator: but it is perfectly clear, that where the fund is given to one for life, and after the death of that person to several others, and in case of their death, to their representatives, there is no reason to presume an intention, that it shall not lapse by the death of the legatee in the life of the testator. It is impossible without transgressing every rule as to vesting to hold this legacy vested, the legatee not having lived to take the benefit under the testator's will."

Legacies given to trustees, are exceptions to the general rule which applies to lapses occasioned by the death of legatees in the life of their testators; for if a legacy were given to *B.* in trust for *C.*, and *B.* died before the testator, living *C.* who survived the testator, the trustee's death would not be permitted to injure *C.* but *C.* would be entitled to the legacy (*d*).

A distinction prevails in regard to lapses when the bequest is intended to operate, in the nature of a release, or in extinguishment of a debt, and when as a mere legacy.—In the latter case we have seen from the authorities above stated, that the death of the legatee in the life of the testator will create a lapse; but it seems that in the former, the court will carry into effect the intention of the testator, against all persons except creditors. Thus if a man expressed in his will that he forgave *B.* a debt, and directed his executors to cancel or give up the security; although *B.* happened to die in the life of the testator, yet the debt would be considered extinct in respect of all persons but creditors;—As an authority,—

(*e*) *A.* bequeathed in the following words: "I likewise forgive my son-in-law *R. Chillingworth*, a debt of 500*l.* due to me upon bond, and all interest that shall be due for the same at my decease, and desire my executor to deliver up the bond to be

(*d*) Eales *v.* England, Pre. Ch. 200, and Moggridge *v.* Thackwell, 1 Ves. Jun. CC. 465—475, stated *infrà*. (*e*) Sibthorp *v* Moxom, 3 Atk. 580.

cancelled." The legatee died before the testatrix, and the question was, whether, under the above bequest, the debt was still subsisting, as *R. Chillingworth* died in the life of the testatrix? And by Lord *Hardwicke*, C. "I am of opinion the plaintiff ought to have the benefit of this discharge of the debt, and that the bond should be delivered up to be cancelled. The testatrix had in contemplation, some benefit to all the branches of her family; the daughter of *R. Chillingworth*'s wife is the person who now applies for this benefit, and it would be hard to say, that because the son-in-law died in the life of the testatrix, that the grand-daughter, who was of the testatrix's blood, should loose it. To be sure where a testator *gives* a debt, or *forgives* a debt, it is a testamentary act, and will not be good against creditors, but against an executor it may. And though this cannot operate as a release at law, yet equity will carry it that length, and if an action had been brought upon the bond, this court would have granted an injunction, or an original application might be made to this court; if so, what operation will it have in the present question? In *Elliot* v. *Davenport* (*f*), had it been said, I *forgive* my son such a debt, and the bond had been ordered to be delivered up by the executor to be cancelled, it had been held to be a discharge. There is nothing *personal* in the present case in the direction that the bond should be delivered up to be cancelled. But it is objected, that this is not an independent clause, but *ancillary*. The question then is, what construction the court should put upon it. I think the testatrix intended *in all events*, the bond should be delivered up to be cancelled; if this was her intention, the case is clear, and would operate most for the benefit of her family. In *Elliot* v. *Davenport*, the words are not penned as *forgiveness* or *remission*, there was no intention to release the recognizance till *B.* paid 150l. thereout; but here is a clear intention to release the debt; *there* it was to be delivered up to *B. here* in general to be cancelled. *There* the right of action subsisted, which was the reason of that opinion; *here* it would be too nice to make such a distinction, and would narrow the bounty too much, intended by the testatrix to her family; and therefore I decree the bond to be delivered up to the plaintiff to be cancelled, but without costs."

This general rule of equity relating to lapses occasioned by the death of legatees in the life of testators, is not so inflexible, but that testators may prevent it attaching by express provision. It seems necessary, however, that other persons should be named to take the legacies upon the death of the legatees, for if no such appointment be made, an express declaration that 4

(*f*) *Supra.*

the legacies ſhould not be defeated, by the death of the legatees, will not be ſufficient to prevent the lapſes which legally incur upon the happening of thoſe events.—Thus,—

(*g*) *A.* bequeathed in the following words: "I give and deviſe the ſeveral legacies and ſums following, which I will ſhall be paid to the ſeveral perſons hereinafter-named, and that if any of thoſe perſons ſhould die before the ſame become due and payable, I will that they or any of them ſhall not be deemed lapſed legacies." The teſtatrix then particulariſed the ſeveral legatees and proceeded, "to *Ann*, the wife of *R. Wenſley*, and to her executors or adminiſtrators, I give the ſum of 50l." *Ann* died in the life of the teſtatrix, and her huſband adminiſtered to her, and the queſtion was, whether this was a lapſed legacy? The counſel for the huſband cited *Darrell* v. *Moleſworth*, 2 Vern. 378, as a caſe in point; "There, ſeveral legacies were given by will, and it was directed, that if any legatee died before his legacy was *payable*, it ſhould go to his brothers and ſiſters. A legatee died in the life of the teſtator, and it was adjudged, that the legacy did not lapſe, but ſhould go over to his ſiſter."—Lord *Hardwicke*, C. "I am of opinion this is not a lapſed legacy. If a man deviſe a real eſtate to *J. S.* and his heirs, and ſignify or indicate his intention, that if *J. S.* die before him, it ſhould not be a lapſed legacy, yet, unleſs he had nominated another legatee, the heir at law is not excluded, notwithſtanding the teſtator's declaration. So in the gift of a perſonal legacy to *A.* though the teſtator ſhould ſhew an intention that the legacy ſhould not lapſe if *A.* die before him, yet this is not ſufficient to exclude the next of kin. But here, in caſe *Ann Wenſley* dies before the teſtatrix, ſhe expreſsly provides againſt the lapſing, for ſhe ſays, if any of theſe perſons die, before the ſame become due or payable, I will that they or any of them ſhall not be deemed lapſed legacies, and ſubſequent to this, deviſes to *Ann*, and *to her executors and adminiſtrators* 50l. ſo that in caſe of her death before the teſtatrix, other perſons are named to take, which diſtinguiſhes it from the caſe I put before; and in *Darrell* v. *Moleſworth*, the court laid a ſtreſs upon the words *was payable*, which is very much the ſame with the preſent, *become due or payable*." Upon the authority of this caſe, his Lordſhip decreed the legacy to the huſband.

The laſt caſe may appear at the firſt impreſſion, to claſh in principle with the above caſes of *Elliot* v. *Davenport*, and *Maybank* v. *Brooks*, but upon a nearer view it will appear that they are capable of reconciliation. It will appear from the peruſal of *Sibley* v. *Cook*, that the teſtatrix did not inſert the words *executors* or *adminiſtrators* as uſual words of annexation,

(*g*) Sibley *v.* Cook, 3 Atk. 572. Alſo Bridge *v.* Abbott, 3 Bro. CC. 224, *ſuprà*, P. 125. Pickering *v.* Lord Stamford, 3 Veſ. Jun. CC. 493.

but as ſignificant of a claſs of perſons diſtinct from *Ann Wenſley*, who were to take the legacy upon her death in the life of the teſtatrix; for the teſtatrix having expreſsly declared, that none of the legacies ſhould lapſe, then proceeded *eodem flatu* to give the legacy to *Ann*, her "executors or adminiſtrators," with the intention of ſubſtituting them in *Ann*'s place on the happening of the event which ſhe firſt deſcribed. But in the two other caſes no ſuch inference of intention could ariſe from any expreſſions made uſe of prior or ſubſequent to the bequeſts made to the legatees, their "executors or adminiſtrators;" which latter words ſeem to have been introduced without any particular meaning, and purely of courſe.

It is apparent that the principle which induces a court of equity to reject the words, "executors or adminiſtrators," in the conſtruction of a bequeſt to *B.* his "executors or adminiſtrators" originates in this reaſon, that the inſertion of them is unneceſſary, as *B.*'s repreſentatives would be entitled to receive his legacy on the event of his death before the time of payment, whether they were named in the gift or not. It is a deduction, therefore, from the above obſervation and the caſe laſt ſtated, that if a reaſonable cauſe can be ſhewn for a teſtator having uſed thoſe words, the court will give them full effect. In further ſupport of this doctrine is the following caſe,—

(*b*) *A.* bequeathed the reſidue of his eſtate and effects to his truſtees, to be placed at intereſt, and directed the intereſt to be paid to his wife for life, and at her death he gave 2000l. part of the principal to his niece *E. C.* or to her proper repreſentative, in caſe ſhe ſhould not be living at the deceaſe of his wife. He alſo gave to each of the children of his ſiſter *Elizabeth*, viz. *John*, *Dorothy*, *William*, and *Chriſtopher*, or "their repreſentatives or repreſentative," 2000l. *Chriſtopher* having ſurvived the teſtator, died before the widow, and the queſtion was, whether, as he did not ſurvive the widow, his legacy of 2000l. did not lapſe? And by the *Maſter of the Rolls*, "I am very clearly of opinion that the legacy to *Chriſtopher* is good. This is ſtronger than the common caſe of a legacy to *A.* and his repreſentatives. There, thoſe words are ſurpluſage, for if the legatee die before the day of payment, it would go to his repreſentatives. But in this caſe there is a reaſon for inſerting them. This is not an immediate legacy, but after the death of another perſon. There is therefore an interval in which the legatee might die, and though it veſted, he might not live to receive it. That addition might be inſerted to put it out of doubt, and muſt mean in caſe they die in the life of the teſtator's wife. I deſire to be underſtood to determine it upon that circumſtance, that there is a life intervening."

(*b*) Corbyn *v.* French, 4 Veſ. Jun. CC. 419---435

The general rule of equity relating to lapſes is equally applicable, whether the legacy be given under a will made by virtue of ownerſhip flowing originally from the teſtator, or whether it be given under a *power* created for the purpoſe; for in the latter caſe, although the legatee will take under the authority of the power, yet he will not be conſidered as taking *from the time of its creation*, ſo as to prevent a lapſe occaſioned by the death of the legatee before the appointor, when the power is executed by will. To illuſtrate this,—

(*i*) Upon the marriage of *E. Paſmer* with Sir *W. Smith*, 10,000l. were by articles veſted in truſtees to be laid out in the purchaſe of lands, to be ſettled on the huſband and wife for their lives, then for the iſſue if any, but if none, a term of 500 years was created, the truſts of which were declared, that if the wife died in the life of the huſband, the truſtees ſhould raiſe 4000l. for ſuch perſons as were or ſhould be her next of kin, as ſhe by deed or will, notwithſtanding coverture, ſhould appoint, and in default of appointment, to be divided among her next of kin, according to the ſtatute of diſtributions, as if ſhe had died unmarried and inteſtate: But if the money ſhould not be laid out in lands, then after payment of the 4000l. the ſurplus was to be paid to her huſband.—*E. Smith* having no iſſue made a will, and reciting her power, appointed the 4000l. to her nephew *W. Gill* for his own uſe and benefit, he paying to his mother an annuity of 100l. for life for her ſeparate uſe, and to enter into a bond for the payment thereof. The reſidue of what ſhe had power to diſpoſe, ſhe gave to her niece *S. Gill* after payment of ſome legacies. *W. Gill* died in the life of *E. Smith*, who alſo died, leaving her huſband the ſurvivor. One of the queſtions was, whether, as *W. Gill* died before *E. Smith*, the appointment in his favour was not void? And by Lord *Hardwicke*, C. "As to the queſtion, whether the appointment to the nephew be good or became void by his death in the life of the teſtatrix; I am of opinion, notwithſtanding the reaſons and the authority preſſed upon me, that it is void by the nephew's death in the life of the teſtatrix: firſt, from the nature of the articles and intention of the parties; which was to reſerve part of her fortune ſubject to her diſpoſition, if ſhe died in her huſband's life: but having it in contemplation that it might be kept in money, if they pleaſed, in that caſe there is a diſtinct particular truſt; the view being plainly to give her as much power to diſpoſe of, or leave it behind her to her own kin, excluſive of her huſband, as if ſhe was unmarried at her death. They rightly conſidered that if they only gave her power to diſpoſe of it, the huſband might overturn it; or if ſhe died without diſpoſing, it would go to him; or if it was to her, her

(*i*) Oke *v.* Heath, 1 Veſ. 135.

executors or adminiſtrators, he as adminiſtrator would be intitled to it. To ſecure it therefore againſt him, and againſt accidents; alſo in all events, that ſhe might not be induced by good or ill uſage to give it to him, ſhe was limited as to her power, to give it to her kin, and to prevent accidents, they provide for a direct inteſtacy. As to the obſervation that ſhe was confined to give it to ſuch of her blood as were in being before the marriage, that is not the conſtruction of the articles: the words, *or ſhould be*, import the contrary; it meant ſuch as ſhall be derived from the ſtock, in oppoſition to the kindred by marriage. This view being remembered, will go a great way to give light to any doubt afterwards. Then the appointment, by death of the appointee, becomes void; for though it ariſes under a *power*, it is a *teſtamentary* diſpoſition, and this is a teſtamentary caſe. A married woman may, by agreement before marriage and with the conſent of her huſband, make a will, which is good in the eccleſiaſtical court, and may be proved there. This was a power over her own property, and which might be ſo in one event abſolutely, if ſhe had ſurvived her huſband, and a part of the ancient dominion which ſhe had over this money; ſhe has executed her power by will; and called it ſo throughout. The whole frame is teſtamentary; and plain declarations to that purpoſe. And although this ariſes out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will, take under the power, in the ſame manner as if their names were inſerted there: yet they muſt take according to the nature of the power and inſtrument taken together. I allow, that if ſhe had executed her power by deed or writing, the repreſentative of the appointee dying in her life, would take thereby; but not if the appointment was, in caſe he ſurvived her. Then ſhe executing her power by *will*, it muſt be conſtrued to all intents like a will; the conditions of which are, that it is ambulatory, revocable, and incomplete till her death: nor can any one dying in the teſtator's life, take under it. Then a perſon married or not, appointing by will, does the ſame, as if it was, in caſe the appointee ſurvives; from the nature of the inſtrument, which every one is preſumed to know. As to its being ſaid, that the appointing by will was only with intent to leave it in her power to revoke; how can I divide it, or ſay, ſhe meant one quality of a will more than another. She might very ſenſibly mean both; for though ſhe might have a regard for her nephew, ſhe did not know who would be his executor or adminiſtrator. That would not be a ſenſible intent: nor could it have had its effect; for if the executor was not of kin, he could not take, unleſs as repreſentative. The moſt natural perſon was the father of the nephew whom ſhe could hardly intend; for what

ſhe has given to his wife, is excluſive of him. This indeed is not an argument of weight, the foundation of my opinion, being, that wherever there is ſuch a power to a married woman, which ſhe executes by will, it is ſubject to all the qualities of a will; which manifeſtly differs it from the caſes of any other writing or deed, which would be complete, and not revocable; and then it muſt veſt. It is ſaid, the matter of this appointment is not teſtamentary, partaking of real eſtates, and not to follow the rules of law in perſonal eſtates. But abſtracted from the power, it is clearly otherwiſe in its nature; if laid out, it would be a term, which is a chattel; if not it would be money. Againſt this reaſoning, the principal thing inſiſted upon is the caſe of *Burnet* v. *Helgrave* (*k*); which indeed is a very particular and extraordinary caſe; and ſuch, as I doubt, if it would be ſo determined now: however it appears by the *Regiſter* to have been a cauſe by conſent, and not adverſary; which takes off greatly from the weight of the opinion there, proving it to have been probably ſudden and without conſideration. But taking it as it is, there are ſeveral differences: firſt, the wife thereby marrying a ſecond huſband, had diſabled herſelf from making a will: nor is the power given to her to be exerciſed during coverture; therefore it could not be a will, but muſt be conſidered as a writing under hand and ſeal only; and then the determination may be right; but that is nothing to this, which is by a will properly proved as ſuch. But ſuppoſe the court took it as a will, or a writing in nature of a will; the appointment there was not perſonally to the huſband only, but the executors or adminiſtrators, and on truſt to pay thereout. It is true that in general, the words *executors* or *adminiſtrators*, are underſtood as repreſentatives only; but not always; as in caſes *per auter vie*, executors or adminiſtrators take not as repreſentatives of the firſt taker, but as new ſpecial occupants newly named in the will or deed; and if they took ſo as to be further perſons taking the truſt, in that light it is different. And the court rather did this in ſupport of the truſt, one of the *ceſtuy que truſts*, for whoſe benefit it clearly was, being then living; nor can the *ceſtuy que truſt* be defeated by the death of the truſtee in the teſtator's life. The words are, that the court took it an execution of a truſt, which is not a *miſprint* inſtead of *power*; and imports the huſband, his executors or adminiſtrators, to be barely truſtees. Another thing in ſupport of that determination, is, that all was come back to the wife herſelf; the huſband to whom and his executors ſhe had appointed, dying in her life, and making her executrix: theſe particular circumſtances make it no authority to govern the preſent caſe: and at moſt it is but a ſingle caſe, and contrary to the general rea-

(*k*) Eq. Ca. Abr. 296.

ſoning which I have gone upon.—*Gill*, therefore, cannot take this 4000l. as repreſentative of his ſon; by whoſe death in the life of the teſtatrix the appointment of him lapſed and determined. His Lordſhip alſo determined, that the 4000l. having become undiſpoſed of by the event which had happened, belonged to *S. Gill*, the reſiduary legatee.—Again,—

(*l*) *Charles* Earl of *Sunderland* made his will in 1720, diſpoſing of his pictures and furniture at his houſe, and deſiring that his debts and legacies might be paid. He then gave 30,000l. to his wife, and after ſeveral other pecuniary legacies, he gave the reſidue of his perſonal eſtate to his eldeſt ſon *Robert*, Lord *Spencer*, except ſuch other legacies as he ſhould indorſe on the back of his will, in the nature of a codicil in his own hand-writing, and appointed, Lord *Robert*, Lord *Godolphin* and others executors. By a codicil indorſed on the will, but without a date, the *Earl* directed the legacy given to his wife, ſhould be to her own uſe and benefit for life only, and after her death, to be divided among ſuch of his children, in ſuch manner and proportion as ſhe by any deed or will, or inſtrument in writing in the nature of a will, ſhould appoint, and for no other purpoſe. The teſtator died in 1722, without revoking his will and codicil, leaving his Counteſs and ſeven children. Upon the ſecond marriage of the Counteſs, a deed of ſettlement was made, in which was an expreſs recital of the will and codicil, and a declaration that the intereſt of the 30,000l. ſhould remain to her ſeparate uſe, and then an expreſs covenant and agreement on the part of her ſecond huſband, that ſhe ſhould have power to make a will, concerning the intereſt and improvement of that ſum. In 1736, and in the life of the ſecond huſband, the Counteſs made a will reciting that ſhe had before appointed 6000l. part of the 30,000l. for the benefit of her ſon-in-law Lord *Robert*, and 2000l. other part thereof for her daughter-in-law Lady *Morpeth*, which ſhe intended as part of what ſhe propoſed to give her at her death; and ſhe ſaid that this was her laſt will and teſtament, and that in purſuance of her power under the will of her huſband (which with the codicil ſhe recited) and of all other powers, ſhe gave, directed and appointed the remaining principal ſum to be paid to the ſeveral children of Lord *Sunderland*, in the following proportions; to the plaintiff 2000l. to *J. Spencer* 2000l. to Lady *Bateman* 3000l. and the reſidue which ſhe computed to be 15,000l. to Lady *Morpeth*, on condition that Lady *Morpeth* ſhould give ſuch a releaſe, as ſhould be tendered by her executors within ſix months after her, the Counteſs's, deceaſe, and ſhould diſcharge all her eſtate real and perſonal from the

(*l*) Duke of Marlborough *v.* Lord Godolphin, 2 Veſ. 61—73.

30,000l. in default whereof the legacy appointed for her ſhould be void, and ſhe made Mrs. *Poultney* executrix, and died in 1749. *John Spencer* and Lady *Morpeth* died in the life of the Counteſs and after the making of her will. Their legacies were claimed by the plaintiff, as being lapſed, undiſpoſed of, and unappointed, and therefore part of the eſtate of Lord *Robert*, the reſiduary legatee of the Earl of *Sunderland*, and belonging to the plaintiff as *Robert*'s executor. Lord *Hardwicke*, C. was of opinion with the plaintiff, and that the Counteſs took a mere eſtate for life in the 30,000l. with a power of appointment among the children of Lord *Sunderland*, the children taking no intereſt in the fund prior to the appointment, but intirely depending upon it; and that as the Counteſs executed the power by will, and *John Spencer* and Lady *Morpeth* died before her, the ſhares appointed to them lapſed and became part of the reſidue of Lord *Sunderland*'s eſtate, to which the plaintiff, as executor of Lord *Robert* the reſiduary legatee, was intitled. With regard to the act done by the Counteſs in execution of her power, and the conſequence of it, his lordſhip expreſſed himſelf as follows,—"She had ſeveral ways to execute it, by deed or inſtrument in writing, or by a proper will: but I am of opinion which ever way ſhe took, to make any of the children of the teſtator take by virtue of it, it muſt be a complete act done by her, and that an imperfect act in execution of this power would not make any part of this money veſt in any of the perſons to take under it; for it is admitted by the defendant's counſel, there is no purchaſer, no greater merit in one than the other; all being volunteers; and therefore no ground to ſupply any defect in the execution of the power. She has choſen to execute it by will: and two of the appointees therein dying afterwards in her life, the queſtion is, what, under theſe circumſtances, is the effect of the execution of the power as to them; whether their repreſentatives can take the ſums appointed. To determine it, one thing is neceſſary to be ſettled, viz. the nature of the inſtrument by which the power is executed. The plaintiff inſiſts, it is by a will; the defendants, that it is not by a proper will, for that ſhe was a *feme covert* at the time; but by an inſtrument in writing, which may have a different effect from a will. I am of opinion, that this act of her's, in execution of her power, muſt be conſidered as a will, and may be truly ſo, as a proper will in this cauſe; but if not, ſtill it may as a writing in nature of a will, and then it will come juſt to the ſame thing as to the preſent queſtion. A *feme covert* may make a proper will, proved in the eccleſiaſtical court, with the aſſent of her huſband, according to the expreſs reſolution of *Mariot* v. *Kinſman*, Cro. Car. 219, where it came in queſtion upon a bond in pleading,

Then, whether there has been ſuch aſſent in this caſe, depends on the deed of ſettlement made on her ſecond marriage. I am of opinion, it does amount to a ſufficient aſſent to her making a will concerning this 30,000l. It is ſaid barely to relate to the intereſt: if it had done ſo when there is an expreſs recital of the will and codicil, and the principal and intereſt ariſe under that will, and ſhe was only to take the intereſt, I ſhould have thought, it was an aſſent to a complete will; but it goes farther; for the word *improvement* does not take in intereſt only, but improvement of the capital, which is part of the principal, and would go to be divided as the principal; for it is eſtabliſhed, that the increaſe and riſe in value of the principal ſhall go to the principal, and not go to the tenant for life in being. But, ſuppoſing this not a proper will, ſtill it muſt be conſidered as an inſtrument in nature of a will, which ſhall have the ſame conſequence as if a will, according to the conſtruction of the court. Then taking it either way, as a proper will or inſtrument in nature of a will, I am of opinion that neither the repreſentatives of *John Spencer* or *Lady Morpeth* could take any thing by this execution of the power, unleſs it veſted in their teſtator or inteſtate, only derivatively, and through them. It is certain, that an executor or adminiſtrator cannot take by virtue of that repreſentation any thing, but what firſt veſted in the teſtator or inteſtate, which brings it to the queſtion, whether by this execution of the power any thing veſted in them in their lives. It is plain, that by virtue of a will or inſtrument in nature of a will, no legacy or gift can veſt till the death of the teſtator, and it is admitted that if this were a gift of Lady *Sunderland*, and a legacy from her, ſo that the children were to take by or under her, it would be ſo, for then it is admitted, the will is not complete till the death of the teſtator; but it is inſiſted that this being in execution of a power, nothing is taken under the inſtrument by which the power is executed, or under the perſon executing, but under the giver of the power, and as legatees in the will of the teſtator: which is true to certain purpoſes, but holds not to the extent contended for on the part of the defendants, that is, not to ſhew that thoſe two legacies or ſums of money veſted by virtue of the execution of this power in the children in their lives, for to that only can it be material. There is no caſe where that has been ſaid to be under a will, whether that will operates by way of giving a legacy or intereſt derived from the teſtator in that will, or by way of execution of a power, or inſtrument in nature of a will which is the ſame; for ſtill it is a teſtamentary act, and the law ſays, that a teſtamentary act is only inchoate during the life of the teſtator, from whoſe death only it receives perfection: being till then ambulatory

and mutable, veſting nothing, like a piece of waſte paper, according to the doctrine in *Brett* v. *Rigden*, in *Plowd.* (*m*), where *Manwood* does not argue, that the will could have effect during the life of the teſtator, but only that the heir ſhould take by purchaſe as deviſee in the will, that the will might take ſome effect. The caſes put for the plaintiff are very material, viz. of a will of land in execution of a power, and the word *will* generally uſed, (which before the ſtatute of frauds would be ſufficient if it was a will not executed by any witneſſes,) it is determined, that a will to paſs lands by virtue of a power muſt have the requiſites in that ſtatute. It is the ſame as to a power to appoint perſonal eſtate by will; unleſs there are other words, which are contended for to give a larger manner of executing the power, it muſt be ſuch a will as will paſs perſonal eſtate. So is the caſe of copy-hold lands very material; not that there is any authority; but as it is a thing, which muſt have often happened. Copy-hold lands are ſurrendered to the uſe of a will; the ſurrenderer makes a will, and appoints the uſes thereof: the law ſays, the lands paſs by the ſurrender, and the will is only directory of the uſes: though the lands are ſo appointed, if the appointee died in the life of the teſtator, it was never thought he could take benefit of it; which muſt have often happened, conſidering the number of ſuch wills: and yet it was never contended, that it would veſt in an appointee dying in the life of the teſtator; becauſe the act was not complete; it being no will till his death, and conſequently at the time it ſhould veſt, there is no perſon to take. So if a power is given by deed to appoint lands by will, and the perſon to whom the power is given, makes a will, and gives the lands to *A.* and his iſſue; the law ſays, that, though ſuch appointee takes under the power, yet the execution of the power being by will, it ſhall receive the ſame conſtruction as if a deviſe of lands, viz. an eſtate tail. So if it had been to *A.* for ever, that would have been an eſtate in fee. It was never doubted, but that the conſtruction of the words would be the ſame exactly, as if he took ſtrictly and properly under the words of a will; and indeed it is repugnant to the nature of the inſtrument, that any perſon ſhould take, or have any thing veſt, by will in the life of the teſtator; and every perſon claiming under the execution of a power, muſt claim not only according to the power, but the nature of the inſtrument by which that power is executed: and therefore a will in execution of ſuch a power, ſuppoſe it was of lands, would be alterable or revocable according to the ſtatute of frauds by cancellation or any of thoſe methods, as a proper will would be; becauſe it is the nature of

(*m*) P. 345.

the instrument which causes that. Suppose such a power was to be executed by deed only, it might be as well said, that the party to take under the execution of that power, should take by an incomplete deed; as in this case by a writing not complete till the death of the testator; there being as great an imperfection in one case as the other. If this was to be taken as an instrument in writing generally, and to have the same effect as if she had made such a common instrument without calling it a will, appointing this payment after her death, as has been argued, that would change the nature of the instrument, and the intent of Lady *Sunderland:* the consequence would be, that it would be irrevocable; for it is revocable only by the nature of the instrument itself: but turn it into another instrument, neither a will or instrument in writing in nature of a will, it is not revocable: for it is determined, that notwithstanding under such a power she might have executed it *toties quoties*, have reserved a new power to herself, and might revoke, yet if she does not reserve a new power, it is irrevocable; which was the resolution of all the judges in *Hele* v. *Bond*, in the House of Lords. There 'Hele had a power in a deed to revoke, and appoint new uses, as often as he pleased: he executed a deed, and revoked; and so a second and third time; and the question was, whether this last revocation was good. It was held not good for want of an express revocation; that this power amounted to no more than a common power of revocation expressed in a great number of words; and therefore the party could not revoke *toties quoties* by virtue of this original power of revocation, but it enabled him to insert a new power of revocation, if he pleased, which not having done, he had executed his power.' So if I should hold this paper to be neither a will, nor instrument in nature of a will, it would be an instrument irrevocable by her; which would undoubtedly be contrary to her intent. It is only revocable from being a will or in nature of a will: and if so, it is equally incomplete till her death; consequently nothing could vest in either of the legatees till her death; at which time, it is a principle of law, there must be a donee or appointee to take: whereas here they were not then *in rerum naturâ*, and consequently no legatee, donee, or appointee, call it which you will, to take at the time the thing was to vest. From this construction of this paper the case in *Hob.* of *Kibbot* v. *Lee*, is material, viz. that this, whether as a will, or instrument in writing in nature of a will, is a declaration in law of Lady *Sunderland*, that it should take effect only from her death. But to this it was said, that in the present case it is otherwise: because the appointee must take under the power, and as if named in the power; and that it was a gift of the testator in his will, she being only an instrument: that the whole reverts back to the

power, under which merely they take; which relation will over-reach the death of theſe two parties, both being living at the death of the teſtator, and then it may be conſidered as veſting in them in their lives; which I deny. I admit the principle, that, where a perſon takes by execution of a power, whether of reality or perſonality, it is taken under the authority of that power: but not from the time of the creation of that power. There is no caſe, that the relation ſhall go back for that, which is quite of another nature: and that is the point, which muſt be contended for here, that they muſt take by relation ſo as to make them take from the time of the creation of the power, for which there is no authority; and that would be unreaſonable. The meaning that the perſons muſt take under the power, or as if their names had been inſerted in the power, is, that they ſhall take in the ſame manner as if the power and inſtrument executing the power had been incorporated in one inſtrument; then they ſhall take as if all, that was in the inſtrument executing, had been expreſſed in that giving the power. So it is in appointments of uſes. If a feoffment is executed to ſuch uſes as he ſhall appoint by will; when the will is made, it is clear that the appointee, *ceſtui qui uſe*, is in by the feoffment, but has nothing from the time of the execution of the feoffment ſo as to veſt the eſtate in him. The eſtate will veſt in him according to the nature of the act done, and appointment of the uſe from the time of the teſtator's death. This, therefore, is not a relation ſo as to make things veſt from the time of the power, but according to the time of that act executing that power; not like the referring back in caſe of aſſignment in commiſſion of bankruptcy: that is by force of the ſtatute, and to avoid *meſne* wrongful acts. The caſe was put of a bargain and ſale, which was ſaid to be like this of a will or inſtrument in nature of a will. A bargain and ſale when acknowledged and inrolled has relation to the time of execution, and if the grantee dies within ſix months, and afterwards it is acknowledged and enrolled, it is good; that is, becauſe it is a collateral act required by act of Parliament, and not ariſing from the nature of the inſtrument itſelf. Conſider the conſequence if this were otherwiſe, that by ſuch a will, or inſtrument in nature of a will, executing ſuch a power, any thing ſhould be held veſted in the teſtator's life, and that the reference to the power, ſhould not only be a reference to the ſubſtance of the power, but to the time of creation: it might as well be ſaid that Lady *Sunderland* might have appointed this money to them, if they had died before her making the will; for it is juſt the ſame thing, and the caſe of the bargain and ſale, if applicable, would hold equally: then the conſequence would be, that ſhe might execute this

power by giving all or greater part to herſelf, for ſhe was repreſentative of her ſon *William*, who died before her will; and it would be abſurd, that powers of this kind ſhould be executed for the benefit of a perſon dead at the time of execution. But it is contended, that there is a great difference between powers, and that this ſhall have effect in this manner, becauſe it is a naked power, theſe ſums being never part of her property, who was only an inſtrument, ſo that whatever execution, it would have this effect, though contrary to the nature of that paper itſelf: that the quality and nature of the will ſhould be out of the caſe, and conſidered barely as an inſtrument in writing: though it is allowed, that where a power is coupled with an intereſt, the party ſhould be conſidered as diſpoſing of the intereſt, and it ſhould have another effect. This is the firſt time I have heard, that the execution of naked powers ſhould be conſtrued more favourably than that of powers coupled with an intereſt. The rule of law is otherwiſe, becauſe the party there in ſome meaſure parts with his own property, as a kind of dominion he has over the eſtate, thoſe powers being conſtrued liberally, but naked powers always ſtrictly. It is farther aſked, where is the difference? that it being admitted, ſhe might have done this by deed or inſtrument in writing not calling it a will, and might have annexed a power of revocation, ſo as to enable her to revoke that, and to execute the power over again, this amounts to the ſame: but that is not *ad idem*. If ſhe had executed this power by deed or inſtrument in writing, though with a new power to herſelf, the conſequence would be, the inſtrument was complete in itſelf; the thing would have veſted from the time of the execution of that inſtrument, and the power of revocation would have no effect, but to leave it mutable during her life. But there is a vaſt difference between a deed or inſtrument with power of revocation, and a will. The firſt is a complete act: a will not ſo, death being neceſſary to the completion, as well as to make the thing paſs: and really, if in queſtions of this kind, ſuch execution of powers by will was to have this conſtruction, and to make any thing veſt in the teſtator's life, ſo that a perſon dead at the conſummation of the will might take by it, in nineteen caſes out of twenty it would be contrary to the authority of the power and intent of the perſon executing; (this I mean in general, not as to the preſent caſe,) for conſider what a perſon does, when making a will: Lady *Sunderland* muſt know, that ſhe ran no hazard, becauſe the inſtrument was revocable till her death; but if a court of juſtice ſhould hold contrary to the nature of the inſtrument, that, although the party dies in the life of the perſon, executing the power, it will veſt in the executor or adminiſtrator, that may be in a

mere ſtranger both to the author of the power, and the perſon executing it. That would be the conſequence, like the caſes of wills obtained from young perſons by ſurprize; as from a young lady at a boarding-ſchool, (an inſtance of which I remember in this court) the maſter getting her, ſhe being above ſeventeen, to make a will and appoint him executor: ſo if this would be good, notwithſtanding the dying in the life of the teſtatrix, it would make it go to a ſtranger. But it is ſaid, this has been determined, that ſuch an execution of a power by will may be good to make it tranſmiſſible to the repreſentatives of the perſon dying in the teſtator's life-time, for which is cited *Burnet* v. *Helgrave*, Eq. Ca. Abr. 296. and if it had not been for that, I ſhould not have ſpent ſo much time about this. But if that caſe be conſidered, it is no authority againſt the opinion now given, or that I gave in *Oke* v. *Heath* (*n*), for there the perſon executing the power, was not limited in reſpect of the objects. It was a general power to ſuch as ſhe ſhould appoint. She appointed to her ſecond huſband, who died before her and made her executrix, ſo that it had really come back to herſelf, and her repreſentative claimed it under the execution of the power. That was a caſe to tempt a court of juſtice to go as far as poſſible to make it good, becauſe it was come back to the perſon, and the ſame thing as if given to her own benefit, and the court only ſupported that in her, which was really orginally given for her benefit. It was no doubt in her power to appoint her executors originally if ſhe pleaſed, becauſe ſhe might do it to any perſon whatever, and there the court might conſider that word *Executors* ſo as not to take by repreſentation, but as a deſcription of the perſon to take, and there is ſomething in the caſe which favours that. It is imperfectly reported in Eq. Ca. Ab. Executors may certainly be made uſe of either in a deed or will as diſtinct and ſeparate perſons from the teſtator, which is the caſe of a ſpecial occupant, 2 Roll. Ab. 151. where the executor ſhall be ſpecial occupant; which ſhews, that executors may take by that name as diſtinct perſons, and not in repreſentation of the teſtator. The court cannot be ſure, upon what Lord *Harcourt* went in that caſe: yet there was room for that from the words: and always were to be taken there to ſupport it, as it was to be conſidered as if originally given for her benefit. But whether that be ſo or not, it is a ſingle authority, and was a cauſe heard by conſent, which certainly weakens its authority; as it proves it in general not to be ſo fully conſidered; and commonly there is a diſpoſition in the parties to give way to what the court thinks equitable, nor is there that oppoſition as in other caſes.

(*n*) *Supra.*

Therefore upon the whole, I am of opinion, that nothing veſted by this inſtrument in *John Spencer*, or Lady *Morpeth*, during their lives, and conſequently nothing is tranſmiſſible to their repreſentatives: and to make it do ſo would be contrary to the principle of law, that the perſon muſt be in being at the time the thing is to veſt."

If a legacy be given to two perſons *jointly*, although one of them die in the life of the teſtator, or although the teſtator revoke the intereſt given to one of them, ſuch intereſt will not be conſidered lapſed or undiſpoſed of, but will ſurvive to the other legatee. In making this deciſion courts of equity differ from the practice of the eccleſiaſtical, where ſurvivorſhip in joint-bequeſts is not allowed. This exception to the general rule relating to lapſed legacies originates from the nature of the intereſt which joint legatees take in the fund bequeathed: they do not take an intereſt per *mis* only, but *per mis & per tout*: if, therefore, upon any event one legatee is deprived of taking the intereſt intended him, the intereſt of the other legatees which extended *per tout*, and was undivided, becomes abſolute in the joint legatee's ſhare.—Thus,

(*o*) *A.* among other legacies, gave one ſhilling to her next of kin. She bequeathed the reſidue of her real and perſonal eſtate to *John Tayleur* and *A. Wauchope*, whom ſhe alſo made executors. By a codicil ſhe annulled and revoked every legacy, thing, and part in the will which related to *A. Wauchope*, and alſo revoked his being one of her executors; ſhe alſo cancelled every thing that was given by her will to the wife of *A. Wauchope*. The bill was filed by the next of kin. Lord *Hardwicke*, C., "I have no doubt concerning this cauſe, for the arguments on the part of the plaintiff are contrary to the principles of law, and the expreſs intention of the teſtatrix. Two points ariſe, 1ſt, whether the codicil is a revocation of the *whole* gift to both? 2nd, if not of the whole, whether of a moiety? 1ſt, it was neceſſary for the plaintiff to inſiſt upon its being a revocation of the whole, otherwiſe it could not be ſo of a moiety. In ſupport of it, it is ſaid, as it is a gift of the whole to both with ſurvivorſhip, each has a benefit by the gift to the other, from the chance he has in the other's ſhare, from whence a revocation of the intereſt of one, revokes ſuch benefit accruing to the other, which is in the whole and the ſubſtance of the gift. But this point is determined in *Davis* v. *Kemp*, Carth. 2, for the intent was that the defendant ſhould take a moiety, and he muſt have it, and though he fails in the circumſtances, yet he ſhall take it by the deviſe.—On the 2nd point two

(*o*) Humphrey *v.* Tayleur, Amb. 136. See alſo Chap. "Of the conſtruction of bequeſts, ſect. joint-tenancy and tenancy in common", for the other authorities.

queſtions ariſe, whether the defendant can take the moiety in diſpute as executor, or as reſiduary legatee? If it were neceſſary to determine the firſt, I ſhould be of opinion he might by the ſettled rules of law; for the executor takes the whole perſonal eſtate by the law, ſubject to the debts and legacies, but this court ſays he ſhall be a truſtee only of the reſidue after diſcharge of the debts, for the next of kin; now this is but a reſulting truſt, and may be rebutted by the intent of the teſtator, and evidence is admiſſible to prove ſuch intent: but here the intent of the teſtatrix is expreſs, for the clauſe relating to the next of kin (called in common parlance cutting off with a ſhilling) moſt clearly ſhews her deſign, that they ſhould have nothing more: and had a clauſe been inſerted declaring her will to give nothing to her next of kin, ſuch a clauſe would rebut their equity. Suppoſe an eſtate given to a deviſee in truſt for payment of debts and legacies, and nothing ſaid of the ſurplus, but a clauſe that ſays, the heir at law ſhall take nothing, the deviſee would be intitled to the ſurplus; but recourſe need not be had to this point, for he is intitled to this moiety as ſole reſiduary legatee, both from the nature of the eſtate given and the benefit itſelf.—1ſt, From the nature of the eſtate. It is objected the eſtate is given to them jointly, that ſurvivorſhip is eſſential to a joint-tenancy, and by that only one can take the whole; that here is no ſurvivorſhip. If an eſtate be limited to two jointly, the one capable of taking, the other not, he who is capable ſhall take the whole, *Carth.* 3. It is objected that if the defendant takes, it muſt be by ſurvivorſhip, but this goes upon a wrong principle of ſurvivorſhip being of the eſſence of a joint tenancy; and it ſuppoſes the eſtate to veſt, which in this caſe does not. Where a joint-tenancy to two is created in a deviſe, and the eſtate veſts by the death of one, the ſurvivor takes by the gift from the nature of the eſtate, and after the releaſe or death of one, it is pleadable by the other as a deviſe to him alone, which could not be unleſs he took the whole by the bequeſt; and ſuppoſe the teſtator revokes the intereſt of the one, the law and conſequence muſt be the ſame. Here is a bequeſt of the reſiduum to two, and an entire revocation as to one of them.—2dly, the defendant is intitled to it from the nature of the gift itſelf. It is objected, there ſhould have been words of gift: that ſuch would have been unneceſſary appears from the nature of the thing given; for it is a bequeſt of the whole reſidue at the time of the death of the teſtatrix, and it is abſurd to ſuppoſe, that where the whole is given away, any part can be diſtributable. And from the nature of the gift, for the reſiduum is a fluctuating indeterminate quantity, and any particular legacy would after revocation fall into it of itſelf: the law adds to the reſidue

without particular words, and herein there is no difference between the revocation of a particular legacy and the reſidue. The difference between *Page* v. *Page*, 2 P. Will. 489, and *Hunt* v. *Berkley*, Eq. Ca. Ab. 243, is founded on there being expreſs words of gift in the one, and not in the other. It is argued, this may be compared to a conveyance to the uſe of two with a power of revocation, where the grantor, revoking as to one, would take back a moiety: but I am of opinion, in that caſe a revocation by a ſubſequent deed, in ſuch words as are in this will, would veſt the uſe in the other grantee. *Davis* v. *Kemp*, Carth. 3, is in point, where *Bridgman*, C. J. ſays, that each is a taker of the whole, but not ſolely, for the whole is deviſed to both, and not a moiety to each; and in all grants and deviſes, the law looks principally upon the intent of the grantor and deviſor: and if the general intent may be preſerved, it will uphold the primary intent, though there be a variance in circumſtances. In this codicil the revocation is perſonal to *A. Wauchope*, and the word *cancel* is remarkable; it is like eraſing his name: had that been done, there would not have been this query, and the effect is the ſame, for a revocation by a codicil, or an obliteration, is to be eſteemed *pro non ſcripto* in the will. The regard and good intent of the teſtatrix appearing in the will towards the defendant, continues throughout to the execution of the laſt codicil, for ought appears to the contrary. He is therefore intitled to the whole."

In caſes where legatees take as tenants in common, with a bequeſt over to the ſurvivors, upon the event of any of them dying within a determinate period, although ſome of the legatees happen to die before the teſtator, yet the legacies will not lapſe, but go to the ſurvivors, under the bequeſt to ſurvivors, upon the ground of ſuch bequeſt over being conſidered an original and ſubſtantive bequeſt, to take place upon the happening of the event deſcribed.

(*p*) *A.* bequeathed to the four children of *H. Miller*, 1500l. a-piece, *viz.* to *N. Miller* 1500l. to be paid when he ſhould attain 21, to *B. Miller* 1500l. when he ſhould attain the like age, to *E. Miller* 1500l. to be paid at 18 or marriage; the like to *Mary Miller*; and in caſe one, or more of them happened to die before their legacies became due, then ſuch legacies ſhould be equally divided among the ſurvivors; and in caſe three of them happened to die before their ages of 21, or days of marriage, then the legacies to them bequeathed ſhould remain to the ſurvivor of them. *Mary* one of the four children of *Miller* died in the life of the teſtator. The queſtion was, whether the 1500l. given to her ſhould go to the ſur-

(*p*) Miller *v.* Warren, 2 Vern. 207.

viving children? And it was decreed that they were intitled to the legacy. And the court ſaid that ſhould a legacy be given to *A.* at twenty-one, and if he died before, then to *B.* though *A.* ſhould die in the life of the teſtator, the legacy ſhould go to *B.*

(*q*) The defendant's teſtator bequeathed 300l. a-piece to his three daughters, *A. B.* and *C.* at twenty-one or marriage; and if any died before, to go to the ſurvivor. *B.* one of the daughters, died in the life of the teſtator. The queſtion was, whether the 300l. was a lapſed legacy, or ſhould go to the two ſurviving ſiſters? And it was decreed in favour of the ſiſters.

(*r*) *C.* having two ſons, *Thomas* and *Joſeph*, and alſo two daughters, bequeathed 1500l. to his younger ſon *Joſeph*, and 1000l. to each of his two daughters, and directed that if any of his three younger children ſhould die before 21 or marriage, his or her portion ſhould go to the ſurvivors, and gave his real eſtate to his eldeſt ſon chargeable with theſe portions. One of the daughters died within age, and before marriage; *Joſeph* alſo died under 21, and unmarried, in the life of his father the teſtator. The teſtator lived to have another ſon, whom he named *Joſeph*; on which occaſion he made a codicil by which he confirmed his will, taking notice, that ſince the making of his will, it pleaſed God to give him another ſon, he therefore gave a legacy of 500l. a-piece to his ſon *Joſeph*, and his ſurviving daughter, over and above what he had given them by his ſaid will. And it being objected, that by the death of *Joſeph* in the life of the teſtator, the 1500l. portion given to him became a lapſed legacy, and ſhould ſink into the eſtate. Lord *Chancellor* ſaid, it was improper to call it a lapſed legacy, becauſe it was a portion given over, and ſhould take effect; that the codicil was a republication of the will, and amounted to a ſubſtituting the ſecond *Joſeph* in the place of the firſt; as if the teſtator had made his will anew, and had written it over again, by which new will the ſecond *Joſeph* muſt take; and that the fixed intention of the teſtator appeared to be, that *Joſeph* ſhould have more than his daughter, whereas, if the 1500l. legacy ſhould be taken to be a lapſed legacy, then the ſurviving daughter ſhould have twice as much as *Joſeph*.

(*s*) *D.* bequeated 200l. a-piece to his children, payable at their reſpective ages of 21, and if any of them died before that

(*q*) Ledſome *v.* Hickman, 2 Vern. 611. (*r*) Perkins *v.* Mickle-thwaite, 1 P. Will. 274. (*s*) Willing *v.* Baine, 3 P. Will. 213.

age, then the legacy given to the perſon ſo dying was directed to go to the *ſurviving children*. One of the children died in *A.*'s life-time, and upon a queſtion, whether ſuch child's legacy ſhould go to the ſurviving children or lapſe into the reſidue, it was reſolved by Lord *King*, C. that although the legacy lapſed *quoàd* the deceaſed legatee, yet it was well given over to the ſurviving children, and the caſes of *Miller* v. *Warren* and *Ledſome* v. *Hickman* (*t*) were cited.

In *Rheeder* v. *Ower* (*u*), *A.* directed the defendants, his truſtees, to inveſt the whole of his reſiduary eſtate in the funds, and to pay the intereſt unto his five ſiſters (naming them) equally for their lives, for their ſole uſe and benefit, and in caſe any of his ſiſters died leaving iſſue, then the truſtees "ſhould pay, aſſign and transfer the ſhare or proportion of the *reſiduum*, to which his ſiſter ſo deceaſing was intitled at or before the time of her deceaſe, to receive the intereſt or dividends thereon, unto and among all and every ſuch child or children of ſuch deceaſed ſiſter, equally between them at their reſpective ages of 21." The teſtator died leaving four of his ſiſters ſurviving him. The other ſiſter died before him leaving the plaintiffs *W. Rheeder* and *M. Jennings*, her children, who had attained 21, and were the only other next of kin of the teſtator. The plaintiffs as children of the deceaſed ſiſter, claimed one fifth of the reſidue, and contended that the intention of the teſtator muſt have been, to give the property to all the ſiſters and their children, notwithſtanding the words ſeemed to exclude the ſiſter who died in his life. In anſwer to which it was alledged, that in order to take, the children muſt be children of ſuch ſiſters as would be intitled to take the intereſt and dividends during their lives. But the Lord *Chancellor* thought, the plaintiffs were intitled to this *as an executory deviſe*, and that in a will ſo looſely drawn, it was more probable that was the teſtator's intent than the contrary.

(*t*) *Suprà*. (*u*) 3 Bro. CC. 240. See alſo Schoolding *v.* Green, and Northey *v.* Burbage, Pre. Ch. 37.—471. S.P.

CHAP. XI.

Of Marſhalling Aſſets.

WITH reſpect to marſhalling Aſſets, we may obſerve that it is the conſtant object of a court of equity to ſecure to perſons having equal claims upon the aſſets of teſtators, a ſatisfaction of them by diſtributing the funds in ſuch a manner as will moſt effectually anſwer that end, without ſuffering one claſs to be more injured than another when there is a deficiency to pay all. With this view the court has laid down a rule, that when a creditor has the option of reſorting to both the real and perſonal aſſets for a ſatisfaction of his debt; and a legatee has the power only of reſorting to the latter for payment of his demand, if there be a deficiency of the perſonal to pay both of them, the court will ſo marſhal or arrange the different eſtates, as to confine the creditor to the real, if ſufficient, for a ſatisfaction of his debt, in order that the perſonal eſtate may be left diſencumbered, to anſwer the demand of the legatee; or in caſe ſuch creditor ſhall have received payment of his debt out of the perſonal aſſets, then the court, upon proper application, will permit the legatee to ſtand in the place of the creditor, to receive ſatisfaction out of the real eſtate, to the amount of what ſuch creditor was paid out of the perſonal fund. But in order to enable the court to extend to legatees thoſe advantages, the real eſtate muſt be charged with the payment of the debts, or with the payment of one or more legacies; or when there is no ſuch charge, the creditor muſt have a *lien* upon the eſtate, except when the owner of it is heir at law, and then as againſt him the legatees will be permitted to throw the general bond-debts upon the lands in exoneration of the perſonal eſtate. The following caſes will ſupport the above obſervations,—

(*a*) *A.* agreed to purchaſe of the plaintiff an eſtate for 1200l. but died before he had paid the whole of the purchaſe-money. *A.* by his will, after giving 800l. to the defendant his ſiſter, deviſed the purchaſed eſtate and all his perſonal property to *J. Kemp*, and made him executor. *J. Kemp* committed a *devaſtavit* of the perſonal eſtate, and died, and the purchaſed eſtate deſcended upon *B. Kemp*, his ſon and heir. The plaintiff brought the bill againſt the repreſentative of the real and

(*a*) Poſſexſen *v.* Moore, 3 Atk. 272.

personal estate of *A.* and *J. Kemp*, for the remainder of the purchase-money. Mrs. *Moore*, the sister and legatee of *A.* filed a cross-bill, praying that if the remainder of the purchase-money should be paid to the plaintiff *Pollexfen*, out of the personal estate of *A.* and *J. Kemp*, she might stand in his place, and be considered as having a lien upon the purchased estate for her legacy. And Lord *Hardwicke*, C. "the vendor of this estate, has a lien upon the estate he sold, for the remainder of the purchase-money, for from the time of the agreement *A.* was a trustee as to the money for the vendor. But this equity will not extend to a third person, but is only confined to the vendor and vendee, and if the vendor should exhaust the personal assets of *A.* and *J. Kemp*, the defendant will not be intitled to stand in his place, and to come upon the purchased estate in the possession of *J. Kemp's* heir. But then, the heir of *Kemp* shall not avail himself of the injustice of his father, who has wasted the assets of *A.* which should have been applied in paying the defendant's legacy. Therefore, the estate which has descended from *Kemp*, the executor of *A.* upon *B. Kemp*, comes to him, liable to the same equity as it would have been against the father, who has misapplied the personal estate, and in order to relieve Mrs. *Moore*, I will direct *Pollexfen* to take his satisfaction upon the purchased estate, *because he has an equitable lien both upon the real and personal estate*, and will leave this last fund open, that Mrs. *Moore*, who can at most be considered as a simple contract creditor only, may have a chance of being paid out of the personal assets." His Lordship decreed that the residue of the purchase-money should be paid out of the personal estate of *A.* but if it should be insufficient to pay such demand, and all the debts, legacies, and funeral expences of *A.* the deficiency should be supplied out of the purchased estate.

(*b*) *B.* bequeathed several legacies to the defendant and others, and devised his real estates in trust for two persons who were his heirs at law, and who by descent would take as coparceners; and by a codicil, he gave over and above the legacy in his will, another legacy of 3000*l.* to the defendant, which he directed his executors and trustees to pay, and charged all his real and personal estate whatsoever, with the payment thereof. The personal estate was exhausted in payment of the 3000*l.* legacy, and the question was, whether the other legatees should stand in the place of the 3000*l.* legatee, to be paid out of the real estate? And by the Lord *Chancellor*, "I have had no doubt from the time I heard the will and codicil read, and all the arguments used at the bar confirm me in it. Ques-

(*b*) Hanby, *v.* Roberts, Ambl. 127.

tion, on the rule of the court in marſhalling aſſets and funds, than which there is not a more uſeful power in this court, for where there are creditors and legacies to children for their portions, if the law was to have its full force, though the reaſon of it was good when it was originally framed, yet in caſe the creditors were to exhauſt the perſonal eſtate, it would be to the ruin of families. The preſent is a deviſe to the heirs at law, but is ſuch as they muſt take by purchaſe. By the codicil, 3000l. is given to the defendant, over and above all other legacies given her by his will, and he declares his intention and meaning to be, that notwithſtanding any bequeſt or deviſe, his real eſtate ſhall be ſubject to ſuch payment of 3000l. as aforeſaid. I ſhall conſider it as if this clauſe had been inſerted in, and was a clauſe of the will itſelf, and the teſtator had directed that it ſhould be taken as part of it, and if they are conſidered as one inſtrument, there muſt be one uniform intention, and that ſupported ſo far as may be. Objection by the plaintiff, that there is no ground to ſay, the 3000l. ſhall be originally charged upon the real eſtate, nor that the other legatees ſhall come upon the real eſtate, in the place of the legacy of 3,000l. becauſe the real eſtate is deviſed, and it was as much the intention of the teſtator, that the deviſee ſhould have the real eſtate, as it was, that the legatees ſhould have their legacies; whether this can be done, is the queſtion. I am of opinion it may. One rule of marſhalling aſſets is clear; if there be debts by ſpecialty and legacies, and no deviſe of the real eſtate, but it deſcends, if the creditors exhauſt the perſonal eſtate, the legatees may ſtand in their place, and come upon the real eſtate. This is againſt an *heir* at law. It is as clear, if one deviſe his real eſtate, and gives general pecuniary legacies, not charged on that real eſtate, and dies leaving ſpecialty debts, and the ſpecialty creditors exhauſt the perſonal eſtate, the legatees ſhall not ſtand in their place, and come upon the realty, becauſe it was the intention of the teſtator, that the deviſee ſhould have the real eſtate, as well as the legatees be paid, and therefore, if one has only perſonal eſtate, and gives ſpecific as well as general legacies, if the creditors exhauſt the general aſſets, yet the general legatees ſhall not ſtand in their place, and come upon the ſpecific legacies. But if one having land and perſonal eſtate, make his will, being indebted by ſpecialty, and he gives ſpecific legacies, and then gives the reſt and reſidue of his real and perſonal eſtate; if creditors exhauſt the perſonalty, the legatees may ſtand in their place, and come upon the reſiduary deviſee, becauſe he has the reſt and reſidue only. In the preſent caſe there are general pecuniary legacies, and in a ſubſequent clauſe, (conſidering the codicil as ſuch) a pecuniary legacy is given of 3000l. which he charges on both his eſtates. *Query*, whether the other legatees

shall stand in the place of the 3000l. legatee? I am of opinion they ought, and that it was the testator's intention. The testator has *expressly charged* his lands with the 3000l. and I do not see how this case differs from that put at the bar.—One indebted by simple contract has lands and personal estate, and begins his will by charging all his estate with payment of his debts, and then after giving general legacies, devises his real estate by way of specific devise. The simple contract creditors exhaust the personal estate; shall not the general legatees stand in their place and come upon the real? the court will order it so, that every body may have satisfaction, and the whole intention complied with. By the words 'over and above,' in the codicil, the testator meant that the defendant should have the legacy given her by the will. Suppose the 3000l. had exhausted all the personalty, should she not have that small legacy in the will out of the realty? she certainly would. Second question, whether the lands and legacies should bear the burthen in proportion to their values? but no ground for it, nor was it the intention of the testator, nor is there any case where it has been done."

(c) *C.* by his will in 1745, gave several specific and pecuniary legacies, and having two sisters, gave one estate to one sister and her children, with remainders over, and also gave a leasehold estate in the same way as far as he might, and the residue of his personal estate, after payment of debts, legacies, and funeral expences, he bequeathed to his two sisters equally, and appointed one of them executrix. By a codicil in 1746, he gave an annuity of 40l. out of an estate in *Kent*, and confirmed his will. By another codicil in 1747, (which he declared a part of his will) he gave 3000l. to *E. R.* besides all other legacies given to her, which sum he directed his executrix to pay within six months after his death, and charged all his estates real and personal with the payment of the same, notwithstanding any bequest of real or personal estates, to the contrary by his last will or any codicils, such bequests and devises to be subject in the first place to the 3000l. The personal estate was much more than sufficient to pay the legacies in the will which amounted to 470l. but the legacy of 3000l. having exhausted the whole, the question was, whether the other pecuniary legatees should stand in the place of the legatee of the 3000l. to the amount of their legacies, against the devisees of the real estate? And by Lord *Hardwicke*, "The case mentioned of a legatee not standing in the place of a bond creditor against a devisee of land, is by a rule and construction of equity, but here the testator has expressly charged the lands with the 3000l. There being then

(c) Hanly v. Fisher, Dick. Rep. 104.

neither want of words nor intention to charge it in the present case, which does not differ from that of an estate specifically devised and charged with the payment of debts, if the simple contract creditors exhaust the personal estate, the legatees shall stand in their place against the devised estate. The question has been considered as divided, viz. upon the will and upon the codicil; but I shall consider it as if the words of the codicil had been inserted in the will, and made but one instrument, in which case there must have been one uniform intent drawn from the whole will considered together, and the testator by declaring that the codicil should be taken as a part of his will, it is the same as if he had actually confirmed the will; and the giving of the 3000l. legacy to *E. R.* over and above all legacies given her by his will, is a declaration of his intention, that the legacies given by the will should be paid, and amounts to a revocation of the devise of the land *pro tanto*. I am therefore of opinion, that the general pecuniary legatees, in respect of their legacies, shall stand in the place of the legatee of the 3000l. against the devisees of the land."

(*d*) *D.* being seised and possessed of freehold lands, leasehold and other personal estates, devised them to trustees to pay an annuity to his wife during widowhood, and subject thereto, to and for the benefit of the child with which his wife was then pregnant, (and which was afterwards still-born) with remainder to his five cousins by name, in fee, if such child died without leaving issue. The testator among other legacies, gave the plaintiff *Foster* 100l. and directed his trustees *to possess themselves of all his estates and substance*, and improve the same for the benefit of his said child, and to pay all his just debts, &c.—The testator made a codicil to his will, and gave to his wife 20l. and another legacy; and in case of any overplus after payment of all his just debts and legacies out of his stock and personal estates, he ordered it to be divided into two parts, and gave one moiety to his wife, and the other to the plaintiffs over and above their legacies.—The trustees filed the bill, praying among other things, an account of the personal estate, and in case it should be insufficient to pay funeral expences, debts, and legacies, that a sufficient sum might be raised out of the real estates to make good the deficiency. To which it was objected, that with respect to the charge of debts, there was not sufficient in this case, to make a charge upon the real estate, it was only a discretionary power, to raise out of the personalty sufficient to pay the debts, he clearly meant the personalty only to be liable, that there was no case where the real estate had been devised, in which the court had marshalled the assets; but by Lord

(*d*) Foster *v.* Cook, 3 Bro. CC. 347.

Thurlow, C. "With respect to the charge for payment of debts, he directed the trustees to possess themselves of all his estate and substance, to pay debts; it is a most direct charge, and the legatees must come upon the real estate, so far as the personalty has been applied in payment of debts."

(*e*) *E.* after directing all his debts and funeral expences to be paid, devised all his real estates to trustees, to the use of his son for life, remainder to his first and other sons by any future marriage in tail male, with several remainders over. The testator after giving divers legacies, directed the residue of his personal estate to be laid out in government securities, in the names of his executors, to be settled and applied to the same uses as his real estates. By the decree upon the hearing of the case, the will was established, and it was among other things ordered, that the personal estate of the testator should be applied in payment of his debts, funeral expences, and legacies, in a course of administration; and in case the personal estate should not be sufficient to pay his debts, funeral expences, and legacies, it was declared that the real estate was subjected by the will to the amount of the debts and funeral expences, that the whole or a sufficient part of the real estate should be sold, and the money applied in making good the deficiencies, and in case any of the creditors had received any thing out of the personal estate towards satisfaction of their demands, then they were not to receive any part of the money arising from the sale, till the other creditors were paid up equal with them. The estate had been sold, and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate.

(*f*) *F.* by his will directed all his just debts and funeral expences to be paid out of the personal estate, and if his personal estate should not be sufficient, he charged his real estate with so much thereof as his personal estate would not extend to pay, and then devised his real estate to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with remainders over, and gave several legacies. The personal estate proving deficient, it was declared that the legatees were intitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in the payment of their debts.

It must be here noticed, that in *Keeling* v. *Brown*, Sir *Richard Pepper Arden*, Master of the Rolls, refused to confine the specialty creditors of the testator to the real estate disposed of by a general residuary clause, the personal estate being suf- 2

(*e*) Bradford *v.* Foley, 3 Bro. CC. 351—note. (*f*) Webster *v.* Alsop, 3. Bro. CC. 352—note.

ficient to pay all the debts, but not the legacies, although the court from the implied charge upon the land by the will, would have marshalled the assets for the simple contract creditors, if the personal estate had been insufficient to pay their demands. The case was as follows—

(g) *A.* began his will in these words, "*Imprimis,*" I will and direct that all my just debts and funeral expences be paid and discharged, so soon as conveniently may be, after my decease, by my executrix and executors herein-after named.—*Item,* I give, devise, and bequeath to my nephew *J. Brown,* all that my messuage, &c. wherein he now lives, at *H.* and also the sum of 400*l.* to hold to him, his heirs, executors, administrators, and assigns for ever." The testator then devised another house to his nephew *Charles* in fee, and gave another house to his wife for life, with remainder to *J. Brown,* in fee. And after bequeathing specific parts of his personal estate to his wife, &c. and giving some pecuniary legacies, he gave the *residue* of his estate and effects whether *real* or personal to *J. Brown,* absolutely, and appointed his wife, *J. Fernehough,* and *H. Hatton,* executrix and executors.—The testator's personal estate being large enough to pay all the debts, but insufficient to answer the legacies; the question was, whether the assets should be so marshalled, as at least to confine the *specialty* creditors to the real estate in favour of the legatees? And by the *Master of the Rolls,* "I am very clear upon both the points. Here is no charge of the debts upon the real estate, but a mere direction to the executors to pay the debts without giving them any other fund than the personal estate, out of which they can fulfil that duty. There is no devise, no trust in them, of the real estate; which is all otherwise disposed of. I cannot, with all the disposition I always feel, to give such a construction to wills, as shall make testators honest, construe this into a charge upon the real estate. It would be a violence to all language, and making a will for the testator; not construing or executing that which he has made: but it is least of all necessary in this case; for it is agreed, that the testator's personal estate, which the executors were to possess, was sufficient to enable them to pay his debts. If any of the debts were to go unpaid by the insufficiency of the personal estate, I would certainly marshal the assets; making the real estate pay as much of the specialty debts, as would be necessary to obtain a fund from the personal estate for payment of the simple contract creditors: but here it is agreed on all hands, that it is not necessary for the payment of the debts of the testator to do so. Then, there being no charge upon the real estate for payment of debts, and

(g) Keeling *v.* Brown, 5 Ves. Jun. CC. 359.

there being an ample fund of personal estate for the payment, both of specialty and simple contract debts, I am asked to throw the *specialty* debts at least upon the real estate, that enough of the personal may be left for payment of the legacies; which are not charged upon the real estates, and for the payment of which, I am clearly of opinion in this case, there is no fund but the surplus of the personal estate, if there shall be any after payment of all the debts of the testator. I cannot marshal the assets for payment of the legacies. I have formerly fully expressed my opinion upon this point, as to the difference between debts and legacies. I understand, the Lord *Chancellor* expressed some doubt of it in the case of *Williams* v. *Chitty*, 3 Ves. Jun. CC. 551 (*b*), but upon reflection, I still remain of the same opinion. Decree an account of the personal estate, and of the debts, funeral expences, and legacies, and if after payment of all the debts, there shall not be enough of the personal estate to pay all the legacies, the legatees must abate in proportion. There is no other fund for their payment."

It is observable in the last case, that the *Master of the Rolls* thought, the introductory clause in the will was sufficient to charge the lands with the specialty debts in favour of simple contract creditors, but not in favour of the legatees, under the persuasion that the law required a stronger mark of intention to charge the real estate with legacies than with debts. This distinction has, indeed, been questioned by Lord *Loughborough*, C. in the case alluded to by the *Master of the Rolls*, so that it seems this decision of his Honour in *Keeling* v. *Brown*, cannot be entirely divested from doubt, while Lord *Loughborough*'s opinion remains uncontrolled by equal authority.

Specific and pecuniary legatees stand upon the same ground in regard to the marshalling of assets, and it seems that the former are entitled to similar equity against executors, and residuary legatees, in instances where there is no deficiency of assets, for if a creditor apply the subject of a specific bequest in satisfaction of his debt, the executor or residuary legatee will be obliged to make the specific legatee a recompence out of the general assets, as they can retain nothing to their own use, but the residue, after debts and legacies paid.

(*i*) The defendant's testator being seised and possessed of a considerable estate in *Holland*, consisting of houses, goods, merchandizes, jewels, and other effects, and being a native of that country, and residing there, sent for a notary public to make his will, and, according to the custom of the country, an instrument was drawn up in the nature of a will, and executed,

(*b*) See Chap. vi. upon "Of charging legacies the real estate." (*i*) Bowaman v. Reeve, Pre. Ch. 577.

whereby the testator gave some of the houses to the minister of the presbyterian meeting there, and others to the minister of the reformed church there; and then gave all the residue of his goods, chattels, plate, jewels, and other effects, (which were very particularly enumerated) to the defendant, whom he made universal heir and executor, and died possessed of a very considerable personal estate in *England*, besides what he had in *Holland*. By the laws of *Holland*, there is no distinction between real and personal estate, but both are equally liable to the satisfaction of creditors; and therefore, after the testator's death, his creditors in *Holland* took possession of the houses specifically devised, in satisfaction of their debts; and though there were other considerable effects in *Holland*, yet the residing devisee and executor would not intermeddle therewith, because if he did so, by the law of that country he must take upon him the payment of all the testator's debts, notwithstanding a deficiency of assets; but he proved the will in *England*, and possessed all the testator's estate and effects here, upon which the plaintiffs, who were devisees of the houses in *Holland*, brought the bill against the executor and residuary legatee, to have a recompence in proportion to the value of the houses. And the *Chancellor* decreed an account and satisfaction accordingly; although it was urged, that those houses, by the law of this country, were liable to the payment of debts, and therefore, the specific devisees ought to take them liable thereto, and that the testator never intended to give them otherwise, or to give them any other part of his estate. And his Lordship also said, that there was no difference between a devise of these houses, and a devise of a horse, or a term for years, and that in those cases, if the creditors brought an action, or sued out execution upon a judgment against the executors, and took the horse, or term for years, in execution, which they might do, notwithstanding the specific devise thereof, yet most certainly the executor or residuary legatee, should be obliged in equity to make them a recompence; for they were to have nothing to their own use but the residue, after the debts and legacies paid, and the *residuum* was chargeable with the debts; though, as to the creditors, they might take what part they thought fit in satisfaction of their debts, and the enumerating of particulars in this devise of the *residuum*, made it no more a specific devise, than if he had only said in general, all the rest of his goods and chattels, or such like words; and therefore this *residuum* was liable to the payment of debts, although the creditors thought fit to fix on other parts of his estate, and thereby deprived the specific legatees of what was intended them.

(*k*) *B.* upon his marriage with *C.* settled his real estate on himself for life, remainder to his wife for life, remainder to the first, &c. son of this marriage in tail male, remainder to his own right heirs.—*B.* having two sons by this marriage, and having a small estate, in fee simple, unsettled, devised his wife's jewels to her, and likewise the use of the plate to her for life: after which he devised all his real estate, subject to his debts and legacies, and after his debts and legacies paid, to his kinsman the Marquis of *Dorchester*, and in 1706, the testator died, leaving two infant sons.—At the testator's death his real and personal assets were not sufficient for the payment of his debts; his widow therefore, gave up the jewels and plate bequeathed to her, which were applied towards the debts: but in the decree obtained for the sale of the real estate, and for an account of the personal, as well as real assets, the widow's claim of her jewels and plate, was saved to her. In 1719, the testator's two sons died under age, and without issue, whereby the estate tail of the settled lands expired, and the reversion in fee falling in, became liable by the will to the debts. And the *Lord Chancellor* said, that in the present case, as there was an express bequest of the jewels to the widow; notwithstanding that, at the time of the death of the testator, there were not assets, either real or personal, yet since afterwards, though by a remote accident, assets had happened, there could be now no inconvenience to any creditor or others; and that this legacy should be paid, and the intention of the testator performed, and the rather for that the real and personal assets were by the will made liable to the debts and legacies. Especially as it was the constant rule, that a legatee, where the real estate was made liable to pay debts, on the creditors exhausting the personal assets, should stand in the place of the creditors, and be paid out of the land; and that this was stronger in the case of a specific legacy, the principal case, which was to be preferred in payment before a pecuniary legacy. His Lordship also decreed, that all the legatees were to be paid, before the residuary legatee took any thing.

Although a Court of Equity will marshal the assets in favour of legatees, yet it will not permit a pecuniary legatee to make use of the security of a specialty creditor, to obtain payment out of the real estate of money received by such creditor out of the personal, when such permission would tend to the disadvantage of a specific devisee of lands not charged with debts, for that would be giving the pecuniary legatee a greater benefit than he is intitled to from the nature of his legacy. Thus,—

(*k*) Burton *v.* Pierpoint, 2 P. Will. 78. 81.

(*l*) *A.* devised all his estate in *Merrow* and *Stoke*, to his son *J. Bignold*, in tail, remainder to the defendant *Joseph Burt*, in fee. He also devised his copyhold estates which he *had* before surrendered to the use of his will, to his son *J. Bignold*, in tail, remainder to the defendants *Joseph Burt*, *James Burt*, and *E. H.* absolutely, (subject to the annuity therein mentioned) to the intent to sell the copyhold, and apply the money to make good and pay his debts and legacies, and he divided the residue among *Joseph Burt*, *James Burt*, and *E. H.* equally. The testator further devised to the plaintiff 500l. within three months after the death of the testator's said son, if he died under age and unmarried, in which case he directed that all his personal estate beyond what would pay his debts and funeral expences, and the 500l. and the other legacies given by the will, should be equally divided among the said *Joseph Burt*, &c. and appointed the plaintiff, and *Joseph Burt*, and two other persons executors. The son died under age; and Lord *Harcourt* decreed, that the rents of the real estate, together with the personal estate, should be first applied in payment of the debts and legacies, but in case of a deficiency, and it appeared that any of the specialty creditors had been paid out of the personal fund, then the creditors by simple contract, and the legatees were to stand in their place, and to have satisfaction out of the real estate, so far as the personal had been applied in payment of such debts.—With this decree, *Joseph Burt* being dissatisfied, petitioned for a rehearing by Lord Chancellor *Parker*, who having taken time to consider the case, reversed so much of the decree as directed a sale of the freehold estate for the satisfaction of the plaintiff's legacy of 500l. observing, *first*, that although equity would marshal assets in favour of a legatee, as well as of a simple contract creditor, yet every devisee of land was as a specific legatee, and should not be broken in upon, or made to contribute towards a pecuniary legacy.—*Secondly*, that it was a rule, that if one give a specific legacy of a horse or diamond, and also a pecuniary legacy of 500l. to *B.* and there were not assets to pay both, still the specific legatee should be preferred, and have his whole legacy, for was the executor to make him contribute towards the pecuniary legacy, this would be *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator.—*Thirdly*, that if a specific personal legatee should not contribute towards a pecuniary legacy, much less should a specific devisee of land.—*Fourthly*, that if in the principal case the testator had devised the 500l. to *A.* and a term of 500 years to *B.* without leaving assets to pay the 500l. still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy, and if such pecuni-

(*l*) Clifton *v.* Burt, 1 P. Will. 678, Ed. by Cox.

ary legatee ſhould not break in upon a ſpecific legatee of a term; *à fortiori* he ſhould not diſappoint the will as to a deviſe in fee, which was to be favoured more than the deviſe of a term, in regard, it was with more difficulty that a court of equity, in any caſe broke in upon or charged the real eſtate.—*Fifthly*, that this caſe was ſtill ſtronger, where the teſtator had appointed a fund for the payment of the legacies, viz. the copyhold, and though that had failed for want of a ſurrender, the conſequence would be, that the fund failing, the legacy muſt alſo fail. That indeed, the bond creditor might elect to have his debt out of the aſſets in the hands of the heir or of the deviſee; but in ſuch caſe the heir or deviſee ſhould have this relief, viz. to ſtand in the place of the bond creditor, and reimburſe himſelf out of the perſonal eſtate.—*Sixthly*, that though equity would thus marſhal the application of aſſets, yet it would not do this to diſappoint the will of the teſtator, by breaking in upon the deviſe of the freehold which the teſtator did not intend to charge, but on the contrary, ſhewed his deſign to charge the copyhold eſtate.

(*m*) *B.* being ſeiſed of real and perſonal eſtate, and being indebted by mortgages contracted by himſelf, and in other mortgages contracted by the former owner on part of his real eſtate, from whom he purchaſed, and alſo in ſimple contract debts, after giving by his will ſeveral ſpecific legacies to Lady *Barbara*, his wife, and ſeveral legacies to the plaintiff, he gave all his real eſtate, both freehold and copyhold, in the county of *Bedford*; and all other his real eſtates in the counties of *Bucks*, *Hertford*, *Warwick*, and *Cheſter*, or elſewhere in *England*, whereof he or any in truſt for him were ſeiſed, in poſſeſſion, reverſion, or remainder, except the ſeveral church and college leaſes therein-after mentioned, to his wife for life, remainder to *Thomas Lord Leigh* for life, remainder to truſtees, &c. remainder to the ſecond, third, fourth, &c. ſons of *Thomas Lord Leigh*, other than the eldeſt ſon; remainder to the teſtator's right heirs.—*Thomas Lord Leigh*, at his death, left the defendant *Lord Leigh*, his only ſon.—The bill was brought by the plaintiffs for their legacies; and if the perſonal eſtate ſhould be exhauſted in payment of debts by ſpecialty, that the plaintiffs might ſtand in the place of the creditors, and be paid out of the real eſtate. And by the Lord *Chancellor*, "There are ſeveral queſtions: 1ſt. Whether the plaintiffs are intitled to marſhal the aſſets, and to ſtand in the place of the ſpecialty creditors generally.—1ſt. I ſhall conſider the queſtion as contended; that is, to ſtand in the place of bond creditors, not accompanied with mortgages, where there is a deviſe of land.—2dly. I ſhall

(*m*) Forreſter *v.* Leigh, Ambl. 171.

conſider it where there are mortgages.—As to the firſt, no authorities go ſo far. They are otherwiſe. The heir at law always had a right, either in caſe of mortgage or not, to have the inheritance exonerated from debts by the perſonal eſtate. The queſtion could never ariſe with reſpect to a deviſee before the ſtatute againſt fraudulent deviſes, for the deſcent was broken, and the deviſee did not want ſuch aid. *Quere*, if ſince that ſtatute, in caſe of a deviſe of lands, and ſufficient perſonal eſtate to pay all the debts, which is exhauſted by them, the pecuniary legatees have a right to ſtand in the place of ſpecialty creditors, to have ſatisfaction out of the realty deviſed? *Clifton* v. *Burt* (*n*), is a determination to the contrary. The ſtatute makes ſuch deviſes fraudulent againſt creditors only, not againſt legatees. The reaſoning of Lord *Talbot*, in *Lutkins* v. *Leigh* (*o*), is ſuch. He diſtinguiſhes between a mortgage and a bond-debt, in reſpect of pecuniary legatees ſtanding in the place of ſuch ſpecialty creditors. *Herne* v. *Merrick*, Eq. Ca. Abr. 143, was determined differently, and though the decree of the Maſter of the Rolls was not reverſed, yet in *Clifton* v. *Burt*, Lord *Harcourt* determined contrary to it; and there is no difference between the caſes from any particularities in either. *Clifton* v. *Burt* was allowed in *Lutkins* v. *Leigh*. So it is in caſe of a ſpecific legacy: there is no reaſon that a pecuniary legatee ſhould break in upon the deviſee. The juſtice would be for all to abate in proportion, but no ſuch decree was ever made. It might be that the value of the whole deviſe might be taken to ſatisfy pecuniary legacies. Objection, that the deviſe here is not ſpecific, but I am of opinion *every deviſe of land is ſpecific*; every legacy of perſonal eſtate is not, becauſe perſonal eſtate varies and fluctuates. Land does not, for no more paſſes by a will, than the teſtator had at the time of making his will. Formerly a deviſee could not have aid of the perſonal eſtate, but afterwards, as in *Corniſh* v. *Mew*, Ch. Ca. 271, and *Pockley* v. *Pockley*, 1 Vern. 36, it was held, that a particular deviſee of lands ſhould have aid of the perſonal eſtate.—2nd. queſtion, as to the mortgages,—they are of two ſorts: 1ſt, thoſe which were contracted by the teſtator himſelf. 2nd, thoſe contracted by the former owner of the eſtates. The covenant for payment of thoſe mortgages entered into by the former owner, will not bind the perſonal eſtate of the teſtator. They were entered into *diverso intuitu*. The two purchaſers did it to indemnify each other. The debt is apportioned on each part, and the teſtator covenants to pay his proportion, or to indemnify the purchaſer of the other part of the eſtate. Where an eſtate deſcends ſubject to a mort-

(*n*) Laſt caſe. (*o*) *Infrà*,

gage, if no person will take an assignment of the mortgage, without the heir at law covenanting to pay, such covenant only subjects his personal estate collaterally. I am of opinion, that the plaintiffs have a right to stand in the place of the mortgagees, to have satisfaction out of the real estate, for what they shall exhaust of the personal. There is a difference as to the bond-debt. A mere specialty debt is no lien upon land in the hands of the obligor, his heir, or devisee. A mortgage is a lien, and an estate in the land. By a devise of lands mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee; if for years, the reversion and equity of redemption passes. Before the statute of fraudulent devises, the devisee of mortgaged lands could not take in prejudice of simple contract creditors. He must have come here for the benefit of his devise, and then the court would have made terms for the simple contract creditors, that is, that they should stand in the place of the specialty creditors. The determination in *Clifton* v. *Burt*, is right, and founded upon it not being a mortgage. Here is a devise to Lady *Bab.* for life, reversion to the heir at law. The plaintiffs may stand in the place of the bond-creditors against the heir, and then the question will be, whether Lady *Bab.* shall be contributory. I will reserve that consideration, until it is seen whether there will be sufficient to pay without it."

When the *equities of legatees are equal*, the Court of Chancery will not interfere in favour of any of them, as in instances where there are two legatees, and both legacies are specific: suppose then the one to be of personal estate, and the other of real, and a creditor having an option to resort to either fund, takes the whole of his debt out of the personal estate specifically given; the Court will not permit the specific legatee to make use of the creditor's security, in order to charge the lands devised with any part of the debt, for the devisee of the land is as much a specific devisee, as the legatee is a specific legatee of the personal estate; the one therefore has no greater claim to the aid or interference of the court than the other. This point was the subject of the *fifth* resolution in the case of *Hastlewood* v. *Pope* (*p*), which resolution was expressed in these words, "Where a man dies indebted by bond and leaves a personal estate, and devises lands to *J. S.* in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor to charge the land devised, because the devisee of the land is as much a specific devisee, as the legatee of a specific legacy."

(*p*) 3 P. Will. 324.

(*q*) *A.* seised in fee of a real estate, which he mortgaged for 500l. and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife and died, leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether the leasehold premises devised to the wife, should be liable to discharge the mortgage. And the *Master of the Rolls*, after taking time to consider of it, and being attended with precedents, decreed that as the testator had charged his real estate with this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended. That by such construction each devise would take effect, viz. the leasehold estate would go to the devisee thereof, and the heir would enjoy the freehold, though subject to the burden with which the testator in his life-time had charged it; that this resolution did not in the least interfere with that of *Clifton* and *Burt* (*r*), because in the latter there was no mortgage.

The natural fund for the payment of debts, is the personal estate, and the heir or devisee of the real, is in general, intitled to have the personal estate applied in exoneration of incumbrances affecting the former; but the Court of Chancery will not permit such arrangement to take place, when it would defeat legatees of their legacies; thus, if it should happen that the personal estate was insufficient to pay all the legacies, the heir or devisee would not be entitled to have real incumbrances paid out of that fund, to the disappointment of general pecuniary legatees.

(*s*) Bill for a legacy of 1500l. given to the plaintiff *Sarah*, by the will of her father, who made the defendant his son and heir, executor. The defendant insisted that there were not sufficient assets to pay the debts and legacies, and to shew the deficiency, said, that the testator upon his marriage with his last wife, conveyed a freehold estate, and also a term for years in the *Sun* tavern, in *Holborn*, to trustees, to raise 1500l. for his wife, in full of any demand which she might otherwise have, and that he had sold the term for years, and thereby raised the 1500l. and paid the same to the wife, on which account the residue of the personal estate was not sufficient to pay the whole 1500l. legacy.—But it was decreed, by Barons *Price*, *Page*,

(*q*) Oneal *v.* Mead, 1 P. Will. 693. (*r*) *Supra*. (*s*) Lucy *v.* Gardener, Bunb. 137.

and *Gilbert*, that the executor should not apply the term to the payment of the widow's 1500l. but that the same should go, in case of a deficiency of other personal assets, towards payment of debts and other legacies; and the 1500l. given to the widow, and then paid, should remain a charge upon the freehold estate.

(*t*) *B.* having mortgaged his freehold lands for 2500l. began his will in these words: "As touching my worldly estate after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in *Kent*, to my wife for life, chargeable with an annuity of 30l. to *E. Knight*, for life." And then after his wife's death, he gave his freehold estate so charged, to the children of his three sisters, and directed the residue of his personal estate to be placed out at interest, his wife to have the interest for life, and after her death, the principal to be divided among the children of his three sisters; and he gave his wife 1500l. with a proviso, that the provisions in the will should be accepted by her in lieu of dower, and in satisfaction of her share in his personal estate.—The question was, whether the personal estate should be applied in exoneration of the real, so as to defeat the pecuniary legatees, there not being sufficient to pay the 1500l. if the personal estate should be applied to exonerate the real? And by Lord *Talbot*, C. "This point has been so far determined, that it seems quite settled and clear; where a man leaves his real estate charged, the legatees and simple contract creditors have a right to stand in the room of bond-creditors, if these latter run away with the personal estate, and this in order to do justice both to the testator's intent, and likewise to the creditors. Indeed where the contest is between the heir and executor, and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied, but that is only where no prejudice is done either to a simple contract creditor or legatee. And had there been no devise of the land in this case, the widow and the other legatees would have had a right to apply to this court, and to stand in the room of the mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate as he had out of the personal. But here the real estate is devised away, which gives the legatees rather a stronger claim, than when they have to do with an heir at law, since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases which distinguish in that case between a devisee and an heir at law, though at last

(*t*) Lutkins *v.* Leigh, Forrest. 53.

he has prevailed, where there is no damage done to a third person. But it has been endeavoured here to put him in a better condition than the heir, and to that end has been cited 1 *Salk.* 416. There is a great difference between that case and this, for a bond affects not the real estate in the testator's hands, nor did it the devisee, until the statute of fraudulent devises, nor before that statute did it affect the heir, if he had aliened before the writ brought. But in case of a mortgage that is a lien upon the land, both in the hands of the testator and the devisees, and in whose hands soever the land comes. Thus the court has gone as far as is reasonable, viz. to put the *hæres factus* in as good a plight as the *hæres natus*, but not in a better. So the legatees must have the legacies out of the personal estate, in case the mortgagee keeps to the real, and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate, as he shall take out of the personal, that being a proper fund for their payment."

(*u*) *C.* after making his will, by which he disposed of his real estate, and gave some specific and pecuniary legacies, mortgaged the estate for 3,000l. and it was contended, that this debt should be paid out of the personal estate prior to the specific or at least before the pecuniary legacies, and it was said to have been determined, that a mortgage should be paid out of the personal estate in preference to the customary or orphanage part by the custom of *London*; which last was admitted by the court, because the custom could not take place till after payment of debts; and it was afterwards admitted by the counsel on both sides, that the land being made by the testator himself a fund for the payment of the mortgage-money, should not be exonerated by the personal estate, so as to disappoint any of the debts or legacies, though it was intitled to such exoneration against an administrator or residuary legatee.

It being a maxim, that "equality is equity," the court of Chancery in compliance with it, has established the rule, that when assets are purely *equitable*, they shall be distributed among persons having equal claims upon them in equal proportions, without any respect to the nature of such demands, or the manner in which they are secured. Assets were formerly considered equitable, when the descent to the heir of the legal estate in lands, was interrupted by a devise of it to trustees, so that the interposition of a court of equity was necessary to subject the lands to the demands of creditors. It has indeed been *vexata quæstio*, whether a devise to the same persons to sell who were also appointed executors, constituted the assets legal or equit-

(*u*) Rider *v.* Wager, 2 P. Will. 329, 335. Also Tipping *v.* Tipping, 1 P. Will. 694; 8 P.

able; but it seems to be now settled, that whether the devisee be *executor* as well as trustee, or whether a bare *power* only be given to him to sell, or whether the estate be suffered to descend to the heir affected with *charge* only to pay debts; the assets in all such cases will be considered equitable. Thus in *Challis* v. *Casborn* (*x*), the devisees of the real and personal estate were made executors, and it was insisted by Mr. *Vernon*, that it was a settled distinction in the court, that the devisees ought to apply the estate in a course of administration, because if the estate were sold, it would be personal assets in their hands, and then to pay a debt of an inferior nature, would be a *devastavit*, but that if they had not been made executors, all the creditors should have come in equally, because in equity all debts were equal, and they as trustees could give no preference, and would be in no danger as executors. But the *Chancellor* thought that the accident of the devisees being made executors, ought to make no difference in equity, but that all creditors should be considered equally; his Lordship would therefore examine precedents.—In *Lewin* v. *Okeley* (*y*), there was a devise to trustees for the payment of debts, and the trustees were also named executors. The assets, said the court, shall notwithstanding be *equitable*, and all creditors must be paid *pari passu*.

(*z*) *A.* who was *cestui que trust* of a real estate, mortgaged it in fee, and being intitled to the equity of redemption, he, by his will, devised to his son and his heirs the premises in mortgage, subject to the payment of debts, annuities, and legacies, and died indebted by bond and simple contract. The questions were, whether the assets of the testator were legal or equitable; and whether the simple contract creditors were to come in *pari passu* with the plaintiff the bond-creditor, or whether the bond-creditor should be first paid in a course of administration? And the *Attorney-General*, for the simple contract creditors, insisted, that the devise to an heir of an estate charged with debts, was the same thing, as devising it in trust to him for the payment of debts, that they were equitable assets, and all creditors intitled to come in *pari passu*. That the bond-creditor could not in this case recover at law, because the testator who was the obligor, had not the legal estate, it being a trust estate and in mortgage, so that he was obliged to come into equity for a satisfaction. And by Lord *Hardwicke*, C. "The particular question here, is, whether the creditors shall come in *pari passu*, or whether a bond-creditor is intitled to the preference. The testator was never entitled otherwise than as *cestui que trust* of a real estate which he mortgaged, and having consequently the equity of redemption of a trust estate, makes his will, and devises to, &c. (*vide the will as before stated*) then dies

(*x*) Pre. Ch. 408. (*y*) 2 Atk. 50. (*z*) Plunket *v.* Penson, 2 Atk. 290.

indebted by bond and simple contract. The first question, supposing the testator had been seised of a legal estate, is, whether, by force of the will, this is not out of the statute of fraudulent devises, 3 and 4 *Will.* and *Mar.* chap. 14. This depends clearly upon the construction of that statute. By this act, 'all wills, dispositions, or appointments of lands, tenements, &c. whereof any persons at the time of their decease, shall be seised in fee-simple in possession, reversion or remainder, or have power to dispose of the same by their last wills, shall be deemed and taken (only as against creditors by bond or specialty binding the heir) to be fraudulent and void; and every such creditor shall have his action of debt upon his and their bonds and specialties, against the heir at law of such obligors and such devisees jointly.' Now before the making of this act of parliament, at common law, a bond creditor, where the land was devised, had no remedy against the devisee, and therefore this statute has taken care that such a devisee shall not prevent the remedy. Then comes the proviso, 'provided always, that where there hath been, or shall be any limitation or disposition of lands or tenements, for the raising or payment of just debts or portions for children, other than the heir at law, in pursuance of any marriage-contract or agreement in writing, *bona fide*, made before marriage, the same and every of them, shall be in full force.' The consequence of this proviso is, that it operates by way of exception upon such devises as are for payment of debts; for this clause does not give any new force to the law in this particular case, but leaves it just as it stood before the making of the act. The question will be then, whether the devise has broke the descent; if it has, then in point of law, all consequences insisted on by Mr. *Attorney-General*, will follow: for the bond creditor is deprived of his remedy at law, and forced to come into this court: but if it has not broke the descent, then this court has no right to take from a specialty creditor his remedy at law. As at present advised, I do conceive it does not break the descent; and for this purpose, *vide Clark* v. *Smith*, 1 *Salk.* 241, in Lord Chief Justice *Treby*'s time, where the court held, that if the same estate is devised to *H.* which he would have taken by descent, he is in by descent, notwithstanding the possibility of a charge; if so, I do not know that a court of equity has ever taken away from a bond creditor his right which he has at law. The case of *Freemoult* v. *Dedire*, comes very near the present. In the fifth section of the statute of fraudulent devises which relates to the heir's at law aliening the land descended, in order to avoid the payment of just debts before the action brought against him, it is enacted, 'that such heir shall be answerable for such debts to the value of the land so aliened, &c. in which cases all

creditors shall be preferred as in actions against executors or administrators, and such executions shall be taken out upon any judgment so obtained against such heir to the value of the same land as if the same were his own proper debt." But as to that part in the first proviso, which takes notice of a devise for raising portions, it is so darkly penned, that I do not well understand the meaning of it. I think this case differs from *Kent* v. *Craig*, for there the testator first charged his lands with the payment of his debts, and then devised the estate so charged to a collateral relation, so that being a devise to a stranger, the descent was broke, and there was no remedy but from the statute, and consequently there was a ground for making it equitable assets: but in *Freemoult* v. *Dedire*, the descent was not broke: In *Kent* v. *Craig*, the whole rested upon the statute; for not only a devise, but an appointment for payment of debts, are enumerated in the enacting clause: here the descent is not broke, and the creditor may have his remedy at law, supposing the testator to have been seised of the legal estate. But the second question will be, whether an equity of redemption of a mortgage in fee of a trust-estate ought to be considered as legal or equitable assets. I do agree, that if a mere trust-estate descends upon an heir at law, it will be considered as legal, and not as equitable assets; and this is founded upon the third clause of the statute which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor, but it has not made a mortgage in fee of a trust-estate subject to the same thing. If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagor, it will be legal assets, because the bond-creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond-creditor can have to make it assets at law, and if the specialty creditor should bring an action against the heir, he may plead *riens per discent*. Therefore if the plaintiff is under a necessity of coming here for relief, this court will act according to its known rule of doing equal justice to all creditors, without any distinction as to priority." His Lordship directed an account of the testator's personal estate to be applied in payment of his debts, in a course of administration; and if that should not be sufficient, then an account of the rents and profits of his real estate to be applied in payment of the debts, not satisfied by the personal estate, *pari passu*. And if the personal estate and the rents and profits of the real should not be sufficient to pay the debts, it was ordered, with the consent of the mortgagees, that the real estate should be sold, and the money after payment of the mortgages applied in discharge of what should be remaining due to the

other creditors of the testator *pari passu*. And that if any of the creditors by specialty should have exhausted any part of the personal estate in satisfaction of their debts, they were not to receive any further satisfaction out of the real estate, until the other creditors should be made up thereout equal to them.

(*a*) In *Hargrave* v. *Tindal*, Lord *Hardwicke* held, that an estate charged by will with the payment of debts, (though it descended, subject to the charge, to an infant heir) was equitable assets, and should be sold immediately without the parol demurring, the same as if it were devised to be sold, though the descent was not broken: for it descended subject to a trust for the creditors. He therefore decreed the estate to the heir in trust for the creditors, and that it should be sold, and the infants should convey when they came of age, unless they shewed cause ot the contrary, and that the purchasers should enjoy the estate in the mean time.

(*b*) *C.* bequeathed specific parts of his personal estate to his wife and two daughters; and, after reciting that he had, previously to his marriage, settled the reversion of his farm-house, lands, and premises, in *O.* in the county of *York*, after the death of his mother, to the use of his wife for life, in case she survived him, with remainders over, and that the mother was then living; he gave to his said wife, in case of his death in the life of his mother, an annuity of 60*l.* during the mother's life, to be paid by his executors, and he *charged* his messuages and premises wherein he dwelt, and his messuage, staith, and premises in the *High Street* in *Kingston* upon *Hull*, and all his estate there, with the payment thereof; and declared that, on the death of his mother, the annuity should cease. He devised all his lands and premises purchased by him in *O.* to his mother, in fee, and directed that all his just debts should be paid; and, in case his personal estate should, on account of losses, be insufficient to pay all his debts, he *charged* all his messuages and premises, and real estate whatever, (except the lands in *O.* settled upon his marriage, and the lands devised to his mother) *with the payment of all his just debts*. And in case his personal estate (save what he had given to his wife and daughters) should fall short in payment of all his just debts, he directed that the defendants *Prime* and *Moxon*, or the survivor of them, or his heirs, should sell all his messuages and estate in *Kingston* upon *Hull* charged as aforesaid, with his messuages in *Wincomsly*, and his close in *Beverley*, and all other his real estate,

(*a*) 1 Bro. CC. 136, note. (*b*) Silk *v.* Prime, 1 Bro. CC. 138, note. Also Newton *v.* Bennet, 1 Bro. CC. 135. Batson *v.* Lindegreen, 2 Bro. CC. 94. Wride *v.* Clarke, 1 Dick. Rep. 382. Bailey *v.* Ekins, 7 Ves. Jun. CC. 319. And Shiphard *v.* Lutwidge, 8 Ves. Jun. CC. 26. SP.

(except as aforesaid) or such other part thereof as should, with his personal estate, be sufficient to pay all his just debts, and apply the money, together with his personal estate, for the payment of all his just debts. He gave all the surplus money, arising as well from the sale of all or any part of his real estate, as also from his personal estate, to his wife and two daughters, and devised to them all his estate which should not be sold for payment of his debts, and appointed *Prime* and *Moxon* executors. The cause was first heard at the Rolls, when Sir *Thomas Sewell* determined, that the assets arising from the sale of the estate were to be considered as equitable assets, upon the ground that the devise was to the executors *and their heirs*, observing, at the same time, that it would be otherwise if the devise had been merely to the executors. He said, by this devise, the descent was broken at law, and the only special circumstance was, that of the trustees and their heirs taking the real together with the personal estate. From this decree there was an appeal to Lord *Camden*, C. who, in affirming the decree, thus expressed himself: "When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the cases, to see what general rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case. Where trustees for the payment of debts are made executors, the printed cases had ruled the assets to be legal. This caused me to doubt, because I had always understood the doctrine of this court was the reverse, and therefore I thought it necessary to look back to the origin of this business, and to fix the principle. Where an estate is devised to trustees for the payment of debts generally, it has long been the constant practice of the court to pay all the debts *pari passu*. This is declared in the case of *Wollestancroft* v. *Long*, 1 Cha. Ca. 32. And the same is again laid down in 2 Cha. Ca. 54, *Anonymous*. As the money, in these cases, never reaches the hands of the executors, no action lay, and the creditor was obliged to come into this court for satisfaction. Whereupon, equity not being tied down to the rule of law, introduced a new method of administration. And seeing the testator had made no distinction between the difference of securities given for the payment of debts, the court conceived that the testator meant to do equal justice to all his creditors. Nor did the court, in this respect, do any injury to specialty creditors.—For, though real estates are assets, at law, to pay such debts, yet the creditor might be defeated by the debtor's will, or the heir's alienation. So that where the will had set aside the law, equity would have forgot its own principle of equality, by giving a priority, which the testator had not done;

answer is, that in all cases where the trustees and executors are one person, the funds are consolidated in the same manner; for out of both, he is to pay all his debts. But the course of administration is different, and, by that very method, it is, that the court is enabled to pay all the debts without distinction, as far as the assets will go, and, by marshalling both kinds of assets, makes them amicably combine to answer the full intention of the testator. 3d. This is the case of a charge upon the lands. They are devised to the testator's wife and daughters, subject to this charge. In this respect it is a trust, and no more to be sold than what is necessary for this purpose. The power, then, to sell is merely consequential, the testator having named the executor for this purpose. The court would have compelled the devisees. Whoever sells to satisfy a charge must be a trustee, because a charge is a trust. To make this still clearer. The rents and profits in the hands of the devisees are assets before the sale. Legal assets they cannot be, for the executors have no right to receive them. They must, therefore be equitable assets. And, if it be once admitted that any one part of the land is equitable assets, the whole must be the same, for the trust is one and the same trust throughout." Decree affirmed.

It is presumed, that the equality of distribution which prevails in the administration of equitable assets, is only applicable when the equities of the several parties are equal, as among creditors: if therefore the trust be expressed to pay legacies as well as debts, the satisfaction of the former will be postponed to the payment of the latter. There is, indeed, an *anonymous* case in *Vernon* (*d*), the decision in which directed that the debts and legacies should be paid in proportion as the assets were equitable; there are also *dicta* in other cases (*e*) corresponding with that direction. There are two cases, however, determined in favour of the priority of creditors, viz. Sir *John Bowle's* case (*f*) determined upon a rehearing by Lord *Nottingham*, in which he reversed the decree of Lord Keeper *Bridgman*, in favour of an indiscriminate distribution among the creditors and legatees, and declared his opinion, "that in the case of a trust for the payment of debts and legacies, the debts ought to be preferred and satisfied before the legatees should have the benefit of the trust?" Lord *Harcourt* also pronounced a similar decree in the following case:

(*g*) *A.* before the statute of fraudulent devises, devised a freehold estate to his second son in fee, subject to the payment of

(*d*) 2 vol. 133. (*e*) 2 Vern. 405. 2 P. Will. 551. (*f*) Cited by Lord Com. Hutchins, in Greaves *v.* Powell, 2 Vern. 248. (*g*) Peire *v.* Bruen, stated in Walker *v.* Meager, 2 P. Will. 551.

his debts, and a legacy of 500l. The queſtion being whether the debts ſhould be preferred to the legacy, Lord *Harcourt* ſaid, he would expound the teſtator's meaning, as it ought to be, to pay his debts before he was charitable, and therefore decreed the debts to be firſt paid.

When legacies are made effectual charges upon the real eſtate, and afterwards other legacies are given by codicil out of the *perſonal* only; upon a deficiency of the latter fund to pay both ſets of legacies, the court will confine thoſe given by the will to the real eſtate, in order that the perſonal may be left diſengaged for the payment of the legacies by the codicil.

(*b*) *A.* by her will, after giving ſeveral pecuniary and ſpecific legacies, deviſed her real eſtate to her nephew and heir at law the defendant, charged with the payment of her legacies above-mentioned, and made him executor. — *A.* afterwards added a codicil to her will, and gave other legacies, which were not charged upon the real eſtate. And it was decreed by the *Maſter of the Rolls*, that the perſonal eſtate not being ſufficient to pay the legacies both by the will and codicil, and the real eſtate being liable to the legacies by the will, and not to thoſe by the codicil, the eſtate ſhould be ſo marſhalled, that, as far as poſſible, the whole will might take effect, and all the legacies be paid. And therefore, that the legatees in the will ſhould be paid out of the real eſtate, and if that ſhould be deficient, as to the ſurplus, they ſhould come in average with the pecuniary legatees in the codicil, to be paid out of the perſonal eſtate; and that, there being admitted to be a deficiency, the land ſhould be forthwith ſold to prevent a greater deficiency.

(*i*) *B.* having two ſons and three daughters, gave by his will 8000l. a piece to his two eldeſt, and 6000l. to his youngeſt daughter, charging his real eſtate with the payment thereof. Afterwards, by a codicil, he bequeathed ſeveral pecuniary legacies of conſiderable value to his ſeveral brothers and ſiſters, without charging his real eſtate with the payment of the latter legacies. Subſequent to which he entered into a contract before the Maſter for the payment of 17,000l. for a third part of the manor of *Cobham-Hall*, in *Kent*. The maſter reported him the beſt purchaſer; and, before his death, which happened ſoon after, the report was abſolutely confirmed.—*B.*'s perſonal eſtate, before his entering into the contract for the purchaſe of this eſtate, was ſufficient for the payment of all his legacies; but the performance of the contract would, as it was thought, occaſion a deficiency of aſſets. The legatees in the codicil therefore prayed, by their bill, that the aſſets might be mar-

(*b*) Maſters *v.* Maſters, 1 P. Will. 421. (*i*) Bligh *v.* the Earl of Darnley, 2 P. Will. 619.

ſhalled, and the daughters' legacies by the will paid out of the real eſtate; or if already recovered out of the perſonal, then, that the plaintiffs might ſtand in the place of the daughters, and take ſo much out of the land for their legacies, as theſe had exhauſted out of the perſonal eſtate: which the court decreed as reaſonable, and within the common rule of marſhalling aſſets.

We muſt notice, that in inſtances where the court will permit legatees to ſtand in the place of creditors who have received their debts out of the perſonal eſtate, ſuch legatees can be intitled to no greater privilege, or advantage, than the creditors themſelves would have been intitled from the nature of their ſecurities: if therefore a creditor cannot, under his contract, affect the real aſſets in the hands of the heir or deviſee, with the payment of his debt, a legatee, who merely ſtands in his place, and upon the ſame terms, cannot be in a better ſituation, which is the caſe with all debts by *ſimple contract*, or by *ſpecialty* when *the heir is not expreſsly bound by the contract.*

(*k*) *A.* in the life of her huſband, levied a fine of her eſtate, making it ſubject to a debt of 2,000l. which had been contracted by her huſband. After his death, ſhe borrowed a further ſum of 400l. and, by an indorſement, agreed that her eſtate ſo pledged, ſhould ſtand charged with this 400l. and not be redeemed without payment of all theſe ſums. The queſtion was, how far ſimple contract creditors were intitled to come upon her real eſtate, in the place of ſpecialty creditors. And, by Lord *Hardwicke*, C. "The rule of the court, as to marſhalling aſſets, and directing ſimple contract creditors to ſtand in the place of ſpecialty creditors *pro tanto* to receive ſatisfaction, is a very juſt and beneficial rule, and ought to be adhered to; and the court leans and endeavours to bring creditors within that rule, and extends it that all the creditors may receive ſatisfaction. Yet it muſt be as between the real and perſonal aſſets of a perſon deceaſed, for the court has no right to marſhal the aſſets of a perſon alive; it not being ſubject to ſuch a juriſdiction of equity till the death. Nor can the court extend this relief to creditors further than the nature of the contract will ſupport it; therefore it muſt be a ſpecialty creditor of the perſon whoſe aſſets are in queſtion, ſuch as might have remedy againſt both the real and perſonal eſtate, or either, of the debtor deceaſed: it not being every ſpecialty creditor, in whoſe place the ſimple contract creditors can come to affect the real aſſets, *viz.* where the ſpecialty creditor himſelf cannot affect the aſſets, as where the heirs are not bound; and ſuch it is here: heirs not being bound in the covenant.—Now to apply theſe general rules to the debts in queſtion: for ſuch debts, upon which there might

(*k*) Lacam *v.* Mertins, 1 Veſ. 312. Alſo 2 Bro. CC. 107. SP.

be remedy against her in her life, or against her representative after her death, the simple contract creditors are intitled to receive satisfaction *pro tanto*; and therefore for the 400l. as being a specialty debt upon her own bond after the husband's death, satisfied out of her personal assets, but not as to the 2000l. which there is no ground to make her personal debt, or any debt of her's. It was originally her husband's, nor could she then make herself liable by contract. There is no covenant for her payment of the money, nor is there such a covenant upon which any remedy could be against her personal estate, unless she had been guilty of a breach, all the covenant being, that the estate should stand charged. This covenantee, therefore, could not have brought an action, or other remedy, against her or her representative, because no breach. Then there is no body in whose place to come *pro tanto*; and this is a case for which the court never would strain, however liberal they are in such cases in the construction for creditors; for it is material in this case that it is the husband's debt, and the intent was, not to change the nature of it, and to make it her debt, for it is only recited in the deed, and the recital of a debt under hand and seal has been held to be no specialty debt, for it must stand upon its own force, and so I have known it determined by Sir *Joseph Jekyll*."

It appears to be now settled that equity will not marshal the assets, except in instances where the legatees, at the time of their legacies becoming due, have an established claim distinctly and solely upon the personal estate; if therefore a legatee have a claim, at the testator's death, upon both the real and personal assets, for the payment of his legacy; but, by some subsequent event, as the death of the legatee before the time of payment, the remedy upon the real is defeated, the court will not marshal the assets in favour of the legatee's representative, so as to preserve a personal fund for payment of the legacy (*l*). Lord *Hardwicke*, indeed, seems to have altered his opinion in *Reynish* v. *Martin* (*m*); but the rule, as above-stated, has been again revived by Lord *Loughborough*'s decision in the following case—

(*n*) *A.* devised his estate, called *Axe*, in the parish of *Brodwinson*, in the county of *Dorset*, and all other his messuages, lands, and hereditaments, within that parish, to *Robert Pearce* and *Robert Taylor*, upon trust to permit his mother to receive the rents and profits for life; and after her death to apply the rents and profits for the maintenance and education of *Thomas Pearce*, son of *Robert Pearce*, until he should attain 21; and,

(*l*) Prowse *v.* Abingdon, 1 Atk. 486.—*supra*, p. 220. Ord. *v.* Ord, 2 Dick. Rep. 439. S. P. (*m*) 3 Atk. 330, *supra*, p. 306 (*n*) Pearce *v.* Loman, 3 Ves. Jun. CC. 135.

when he ſhould attain that age, in truſt for him, in fee, and if he died under 21, upon other truſts. He gave his mother all his ſtock upon the ſaid eſtates, and all his ready money. He alſo gave to *Thomas Pearce* and *Robert*, another ſon of the ſaid *Robert Pearce*, 1000l. to be paid at 21, with intereſt at 3 per cent. in the mean time from his death, to be applied for the ſupport, education, and maintenance, of *Thomas Pearce* and *Robert Pearce* the younger, or ſuch part thereof, as his truſtees ſhould think fit. After ſeveral other legacies, he gave the reſidue of his meſſuages, lands, &c. and his manor, &c. at *Clapton*, within the pariſh of *Crewkerne*, in the county of *Somerſet*, and all his perſonal eſtate and effects, whatſoever and whereſoever, not therein before diſpoſed of, ſubject and chargeable with the payment of his debts, legacies, and funeral expences, unto *Robert Taylor* and *Robert Pearce* the elder, in truſt to ſee his debts, legacies, and funeral expences paid; and after the payment thereof, in truſt for his couſin *John Perkins*, abſolutely, to whom he gave the ſame upon this condition, that he ſhould, with all convenient ſpeed after the teſtator's deceaſe, diſcharge all his debts, legacies, and funeral expences; but in caſe he ſhould neglect or refuſe ſo to do within a reaſonable time after the teſtator's death, then he impowered his truſtees to ſell his ſaid manor, capital meſſuage, farms, &c. perſonal eſtate, and effects, to pay all his debts, funeral expences, and legacies, and after the payment thereof, and all expences attending the ſame, he gave the overplus money and ſuch of his real and perſonal eſtate, as ſhould remain unſold, unto his truſtees, for the ſaid *Thomas Pearce* and *Robert Pearce*, the younger, to be equally divided between them when they ſhould attain 21; and declared, that the deviſe in truſt for his couſin *John Perkins* ſhould be void from the time of his refuſal aforeſaid. He then appointed *Robert Taylor* and *Robert Pearce*, the elder, executors. *Robert Pearce*, the younger, died under 21, inteſtate and unmarried, whoſe father, as his adminiſtrator, claimed the legacy; and the queſtion was, whether, as the legacy was a charge upon the real as well as the perſonal eſtate, the court would ſo marſhal the aſſets, as to direct payment of the legacy out of the perſonal eſtate, although it failed as a charge upon the lands by the death of the legatee before the time of payment? And by Lord *Loughborough*, C. "With regard to marſhalling the aſſets in *Prowſe* v. *Abingdon*, Lord *Hardwicke* had the point preſſed upon him by Mr. *Fazakerly*, and Lord *Mansfield*; and Lord *Hardwicke* declared it impoſſible to marſhal in any caſe except where, at the time the legacy became due, the perſon intitled had an eſtabliſhed claim diſtinctly and ſolely upon the perſonal eſtate, and there could be no caſe for marſhalling, where the legacy fails to affect the real eſtate in conſe-

quence of an event that happened subsequent to the death of the testator, as the death of the legatee before the time of payment. If marshalling could be carried to the extent of *Reynish* v. *Martin*, it might have been pursued in all the cases that have been decided. There is a singularity in the doctrine as it now stands: that as far as it affects one fund, it is good; as far as it affects the other, bad: but it would be still more singular, if it shall sink in one case and not in the other, but the land making good the personal estate shall be charged. The point was of very little moment in *Reynish* v. *Martin*; for in Mr. *Forrester*'s note, the gross amount of the personal estate is stated to be 100l. and Mr. *Wilbraham*, in Lord *Hardwicke*'s note, says, it is 100l. odd shillings and pence, therefore he speaks accurately from an account of it. The legacy was 800l. Therefore I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse* v. *Abingdon*: the contingency is the same, and I cannot charge the real estate indirectly. I have found, in Lord *Hardwicke*'s note-book, the case of *Lowe* v. *Mosely* referred to in the argument. There is very little of it, but exactly what he states. The note is this: "*Lowe* v. *Mosely*, upon the will of *Mills*. 300l. given to his daughter: 150l. at the age of twenty-four, 150l. at twenty-six. He devises his real estate to his son *James*, he paying debts and legacies. Several questions upon acts the son had done. He had mortgaged: question, whether the charge remained against the mortgagee. She died between 24 and 26. I was of opinion that 150l. was due, but that the other 150l. sunk into the real estate, she dying under 26." Not a word said about marshalling: it was a mixed fund, and a mortgage, I think, was one of the charges that affected the personal estate."

Equity has also refused to marshal the assets in favour of *Legacies given to charitable uses*, as that would be considered a mean to evade the statute of Mortmain (*o*), and to effect in substance a charge upon the land within the spirit of that act. 12

(*p*) *A.* devised her real estate to trustees to be sold, the profits to be applied to the uses of the will. She directed that her debts and legacies should be paid out of the personal estate, made the trustees executors, and left them all the residue of her personal estate, and of the money to arise by sale of the real, to be given in what charities they should think proper, recommending particularly to them the hospital at *Bath*. Question, whether the assets should be so marshalled, that all the other legacies should be paid out of the real estate, so as to

(*o*) 9 Geo. 2 c. 36. (*p*) Mogg v. Hodges, 2 Ves. 52.

leave the perſonal to go to the charity? And Lord *Hardwicke* ſaid, he thought himſelf not warranted to ſet up a rule of equity, contrary to the common rules of the court, merely to ſupport a bequeſt which was contrary to law. It would be contrary to the expreſs direction of the teſtatrix, who deſired firſt that her legacies and debts ſhould be paid out of the perſonal eſtate, the natural fund, and if the heir or deviſee of the real eſtate, were ſued by a bond-creditor, he might ſtand in the place of that creditor, to be reimburſed out of the perſonal. In *Dalton* v. *James*, the legacies were particularly chargeable upon both eſtates, and the court would always for the furtherance of juſtice, as in the caſe of debts, or to comply ſo far as was conſiſtent with law, with the intention of the teſtator, in the caſe of legacies, when there were two different funds for the payment of debts and legacies, order each particular to be paid out of that fund, it legally might. But that the aſſets could not be ſo marſhalled as to ſupport a legacy contrary to law.

(*q*) *B.* deviſed all her freehold and leaſehold eſtates, to truſtees to ſell, and out of the money to buy ground for an almshouſe in the pariſh of *Saint James*, in the city of *Briſtol*; and likewiſe to erect an alms-houſe, and to lay out the reſidue of the money in land; and out of the rents and profits to pay certain ſtipends to twenty poor people, whom ſhe had before appointed to be in the alms-houſes: and until ſuch purchaſes could be made, ſhe directed the money to be laid out on real or government ſecurities. And in caſe the charity could not by law take place according to her directions, then ſhe ordered her truſtees to lay out the money in ſuch charitable uſes, intents and purpoſes, as near to her intention as could be, and the laws would permit. She then gave the reſidue of her eſtate to ſuch uſes, intents and purpoſes, as aforeſaid. By a decree in 1759, it was declared, that the deviſe of the freehold and leaſehold eſtates to the charity was void; and an account was directed to be taken of the perſonal eſtate. On further directions, the *Maſter of the Rolls* declared, that if the truſtees could obtain the gift of a piece of ground in *Saint James*'s pariſh in *Briſtol*, they might erect an alms-houſe upon it, and declared, that the truſtees were entitled to have the aſſets marſhalled, by applying the leaſehold in the firſt place, in payment of debts, legacies, funeral expences, and coſts, in order to leave more of the perſonal eſtate free and clear for the purpoſes of the charity. The defendants having appealed from this decree, Lord *Henley*, Chancellor, after argument at bar, and time for conſideration, delivered his opinion; "As to the freehold, there is no doubt, that muſt go to the heir at law,

(*q*) Attorney General *v.* Tyndall, Ambl. 614.

The queſtion reſpects only the leaſehold, which, by reaſon of the deviſe being void, falls into the *reſiduum*. Queſtion, whether the court ſhall marſhall the aſſets, and by applying the leaſehold in the firſt place to payment of debts, leave the other aſſets to be applied to the charity, and by that mean do *per obliquum*, what could not be done *per directum*. The old rule of marſhalling, was in caſe where a perſon had a double fund to reſort to, and another perſon had a demand upon one of thoſe funds, the court has turned the perſon having the double ſecurity upon that fund, which was not liable to the other perſon's demand, in order to leave that fund open which was. That was attended with no inconvenience to any perſon, and it effectuated the intention, but this would be a method to elude the ſtatute which I will not do. 2d queſtion, reſpects the building an alms-houſe, if the truſtees can get the ground given them. The decree in this part is founded upon the precedent of the *Attorney General* v. *Bowles*, which is an authority for the *Maſter of the Rolls*. But I feel only one authority, that of the Houſe of Lords, which is a ſuperior court, no other authority has any influence on my judgment. That precedent has no influence upon me, it is contrary to the ſpirit of the ſtatute. In common ſenſe, it is laying out money in land: it improves the ſcite, is demandable in a *præcipe*, and is a purchaſe of ſo much realty; ſuch a determination is opening a door to avoid the ſtatute. It is indifferent to the donors in what ſpecies of charity they give their money: not ſervice to the poor, but vanity is their motive (*r*). If theſe precedents were to prevail, we ſhould ſee alms-houſes turned into palaces, immenſe buildings upon ſmall ſpots of ground. Beſides in this caſe, the building is directed upon ground purchaſed with her own money. To make her go begging for ground, is contrary to her intention, and what moſt likely ſhe would not have ſubmitted to. It is therefore departing from this will, to do an illegal thing. The two propoſitions in the ſtatute, are as clear as any in *Euclid*; 1ſt. you ſhall not give land to charity: 2d. you ſhall not realize for the benefit of a charity. If the doctrine of that precedent were to prevail, land not worth 50l. might become worth 20,000l. All that remains reſpects the reſidue, and I hold the deviſe of it to be void, as being given to be laid out in lands and tenements. It is deviſed to ſuch uſes, intents and purpoſes aforeſaid, and the only purpoſes in the will are to be laid out in land for charities. Before the ſtatute, in caſe of a bill brought for the purpoſe, the court would have directed the reſidue to be laid out in land. In *Soreſby* v. *Hollins*, the

(*r*) *Sed vide* the Attorney General *v.* Parſons, 8 Veſ. Jun. CC. 186—ſtated *infrà*.

original intent was, to lay out the money legally in land, *or otherwise.* Here the original intent was, to lay it out in land. The trustees cannot depart from the original intention, nor be permitted to say the money shall continue on securities. The immediate precedent clause is; 'and in case my intention cannot by law take place, the trustees are to lay out the money to such charitable uses, intents and purposes, as near to my intention as can be, and the laws will permit.' Whether any use was made of that clause at the hearing, does not appear, but I am clear that it is fraudulent and a void clause. It is inserted as a means to intimidate the heir at law, and the next of kin, and prevent their opposing the charity. I greatly approve of the statute, and shall always support the spirit of it fairly, without any chicanery to get rid of it. Let the decree be reversed, except so much of it as relates to costs, the account, and securities of the money arising by the sale of the leaseholds, and let the surplus be distributed according to the statute of distributions."

(*r*) *C.* devised her real and personal estate, after payment of her debts, funeral expences, and charges of proving her will, to the plaintiffs, in trust, to dispose thereof, and directed the trust money to be paid to certain charitable uses. Question, whether the court would marshal the assets, and order the debts to be paid out of the real estate, in order that the personal might be left clear, so that the devise to the charity might take effect. But *Smyth*, Baron, who sat for the Lord Chancellor, declared his opinion, that the debts could not be thrown upon the real estate; and that the cases of *Mogg* v. *Bath* hospital, and the *Attorney General* v. *Tyndall* (*s*), were in point.

(*t*) *D.* after devising an estate to the plaintiff and his family, and several legacies, bequeathed all his personal estate, together with his estate at *Foxfield*, held by lease of the Bishop of *Winchester*, descendible to his right heirs, in trust, to sell the said estate, and out of the money to pay his just debts, funeral expences, and several legacies; and to the Warden and Fellows of *Winchester*-College, 100l. to be disposed of as they should think fit, for the use of superannuates, not succeeding to New College: to the county hospital at *Winchester*, 50l.; to the governors of the charity for relief of poor widows and children of clergymen, 600l. And after reciting, that it was uncertain what his effects might amount to, he gave whatever remained, after payment of debts, legacies, and other charges, to his executors, to be disposed of to such charitable uses as they should think fit, and appointed *Taylor* and *Knapp* executors. In

(*r*) Foster *v.* Blagden, Ambl. 704. (*s*) *Supra.* (*t*) Hillyard *v.* Taylor, Ambl. 713.

1761, the *Maſter of the Rolls* decreed, that if the perſonal eſtate ſhould be wholly or in part exhauſted, in ſatisfying the debts and funeral expences, and ſuch of the legacies as were not given to charity, then the legatees of the charitable bequeſts ſhould ſtand in the place of the ſpecialty creditors, and receive a ſatisfaction *pro tanto*, out of the real eſtate. But without prejudice to the queſtion, whether the legacy of 100l. given to the Warden and Fellows of New College, was within the ſaving clauſe of the ſtatute of Mortmain, which might ariſe, in caſe the before-mentioned marſhalling of aſſets ſhould not be ſufficient to furniſh the whole of the legacies given to charities; and he directed an account of the rents and profits of the *Hampſhire* eſtate, and the balance to be applied to make good the deficiency of the perſonal; and if thoſe funds ſhould prove deficient, the real eſtate in *Hampſhire* to be ſold, and applied to make good the deficiency. The perſonal eſtate, and the rents and profits of the *Hampſhire* eſtate, proving deficient, that eſtate was ſold, and the purchaſe money paid into the bank, and laid out in 4293l. 15s. 8d. three *per cent* annuities. After twelve years, there was an appeal from the above decree, occaſioned by the determination of *Foſter* v. *Blagden* (*u*). And the Lord Chancellor, without hearing the reply, reverſed the decree, ſo far as related to the charitable legacies to *Wincheſter* hoſpital, and for the relief of widows and children of clergymen on the authority of *Foſter* v. *Blagden*; and directed an inquiry, what fund was eſtabliſhed at *Wincheſter* College, to defray the expence of ſuperannuates at either of the univerſities; and after ordering the coſts, declared that the reſidue of the three *per cents* belonged to the heir at law.

(*x*) *E.* being ſeized of freehold and copyhold eſtates, and poſſeſſed of leaſehold and other perſonal property, deviſed to truſtees all his freehold, leaſehold, copyhold, and perſonal eſtates to ſell, and out of the money to pay among other legacies, 200l. to the *Bath* infirmary, and other charitable legacies, to the amount of 1200l.; alſo 200l. to erect a monument to the memory of *J. Curle*; and after payment of ſeveral pecuniary legacies, to pay the ſurplus of the money ariſing from the real and perſonal eſtates, unto the plaintiff, and *D. Evans*, and appointed them executors. *Evans* died in the life of the teſtator. By codicil, among other legacies, the teſtator gave to two of the defendants, 100l. in truſt, for another charity, (but without naming any fund out of which it was to be paid) and ordered a monument to be erected to himſelf. He afterwards made a ſecond codicil, by which he gave ſome legacies, and died in *November*, 1781, leaving the plaintiff his ſurviving ex-

(*u*) *Supra.* (*x*) Makeham *v.* Hooper, 4 Bro. CC. 153.

ecutor and reſiduary legatee, and two others of the defendants his heir at law, and next of kin, who had aſſigned their claims to the plaintiff. The bill, after the uſual prayer in regard to the will and codicils, and the general perſonal eſtate, prayed that the charitable legacies might be declared void, and to fall into the reſidue; and that the real eſtate might be ſold, and the clear reſidue of the money, as alſo the teſtator's perſonal eſtate might be declared to belong, and be paid to the plaintiff as reſiduary legatee. The cauſe was heard before Lord *Thurlow*, C. in *February*, 1784; and by the decree, the will and codicils were declared well proved, and ought to be eſtabliſhed, and the truſts performed; and it was referred to the Maſter to take the proper accounts, and to diſtinguiſh what aroſe from chattels perſonal, and chattels real; and he reſerved the conſideration whether the charity-legacies were to be paid, and in what manner, and all further directions till after the maſter's report: from which report it appeared, that the money received by the plaintiff and the truſtees, amounted to 19881. 7s. 7½d. and that they had paid 10371. 15s. 5d. ſo that there remained a balance of 950l. 12s. 2½d. That the legacies, beſides the charitable ones, amounted to 4490l. ſo that the perſonal eſtate fell ſhort of paying the ſame in 3539l. 7s. 9½d; and that the real and leaſehold eſtates ſold for above 6000l. The queſtion was, whether the aſſets ſhould be marſhalled? And it was determined in the negative; *Aſhurſt*, Lord Commiſ obſerving, that "he thought they were bound by the recent caſes with reſpect to the queſtion of marſhalling: that it did not appear what was the reaſon of the turn in the caſes, but as the deciſions had taken that courſe, they could not alter them." But the legacy to the *Bath* infirmary, was ordered to be paid in conſequence of the act of the 19th Geo. III. permitting that charity to take in Mortmain.

CHAP. XII.

Of the Repetition of Legacies.

IT has been *vexata queſtio*, in regard to what ſhould be conſidered a mere repetition of legacies, when two or more were given to the ſame legatees, by the ſame will, or by different inſtruments. The queſtion, however, appears at preſent, to be in ſome degree ſettled, and the following principles may be extracted from the ſeveral caſes determined upon the ſubject;—

Firſt; with reſpect to legacies repeated in the *ſame* will;—When legacies are repeated in the ſame will, being of *equal amount*, and are given for the ſame cauſe or purpoſe, or no additional reaſon is aſſigned for the ſecond bequeſt; in thoſe inſtances the court of chancery has inferred an intention in the teſtator, to give the legatee one legacy only, which adjudication is alſo agreeable to the civil law (*a*).

(*b*) *A.* bequeathed "to her niece, *Mary Cook*, 500l." and afterwards in the ſame will, among many other legacies, gave "to her couſin *Mary Cook*, 500l. for her own uſe and diſpoſing, notwithſtanding her coverture;" Lord *Bathurſt*, C. declared, that *Mary Cook* was intitled to one legacy only of 500l. and that the ſame was for her ſeparate uſe. The cauſe was afterward reheard upon this point, and the decree was affirmed.

(*c*) Two legacies of 1000l. each, were given in the ſame will to the ſame legatee, in the following manner: "I give to *B.* 1000l. old South-ſea Annuities, to be transferred into her own name;"—and then towards the cloſe of the will, "I give to *B.* 1000l. old South-ſea Annuities, as aforeſaid." It was endeavoured to ſupport theſe as ſeparate legacies, and that the legatee ſhould take both; but not allowed.

(*d*) *C.* gave among ſeveral legacies an annuity in theſe words, "to *Thomas Newman* I give an annuity of 30l. for his life, payable quarterly at the uſual quarter-days; the firſt payment to be made on ſuch of the ſame days as ſhall firſt happen after my death." And towards the concluſion of the will the teſtator proceeded thus, "I give to *Thomas Newman*, the butler, 30l. a year for his life." The queſtion was, whether *Thomas Newman* ſhould be entitled to two annuities of 30l. each, or to one annuity of 30l. And by the *Maſter of the Rolls*, de-

(*a*) Swinb. pt. 7, ſect. 20 & 21, pages 526—530. (*b*) Greenwood *v.* Greenwood, 1 Bro. CC. 30, note. (*c*) Garth *v.* Meyrick, 1 Bro. CC. 30. (*d*) Holford *v.* Wood, 4 Veſ. Jun. CC. 79—91.

clare, that the ſecond annuity of 30l. given to *Thomas Newman* is not to be conſidered as accumulative, but as the ſame annuity of 30l. given to him in the prior part of the will.

2 If the legacies *differ in amount*, or if either of them be *contingent*, ſuch legacies will not be conſidered as merely repeated, but accumulative;—Thus,—

(*e*) *A.* deviſed as follows:—"I give to her (*E. C.*'s) ſon, *John Curry*, 1000l. when he arrives at the age of 21, the intereſt of which to be paid to his mother till he arrives at the age of ten years; and then I deſire my executors will take him and put him to a proper ſchool for his education, and when he arrives at that age, I deſire they will expend out of my eſtate 100l. a year till he arrives at the age of 21, and then I give him 5000l." The queſtion was, whether *John Curry* ſhould take both the legacies, or only one. And Lord *Thurlow*, C. decreed that he was intitled to both.

3 *Secondly.*—As to legacies bequeathed by *will* and *codicil* to the ſame perſon.

When legacies are given by will and codicil to the ſame perſon, whether they be of *greater*, *equal*, *or leſs values*, ſuch legacies *prima facie* will be conſidered as diſtinct gifts, and accumulative; each inſtrument being allowed to ſpeak for itſelf. The court has ſaid upon thoſe occaſions, that there is no reaſon why the ſecond inſtrument ſhould be made, unleſs the intention was to add to the firſt; and with this agrees the civil law (*f*).

(*g*) *A.* among ſeveral legacies left to her relations and others, bequeathed to her nieces *B.* and *C.* 200l. a-piece, and to her niece *D.* 400l.—*A.* afterwards made a codicil, thereby giving pecuniary legacies to ſeveral of the perſons to whom ſhe had before given legacies by her will, many of which legacies were larger than what were given by the will; and ſhe alſo gave to her ſaid three nieces *B. C.* and *D.* 50l. a-year for their lives.—After the date of the will, but before the making of the codicil, the teſtatrix's mother died, on which event a conſiderable increaſe of perſonal property came to her. It was objected, that as the pecuniary legacies in the codicil exceeded thoſe in the will, and were given to the ſame perſons, they ſhould be in ſatisfaction of the legacies by the will, and particularly, that where the annuities given by the codicil were of greater value than the legacies in the will and were given to the ſame perſons, they ſhould preclude ſuch perſons from claiming both: But the court ſaid, that the annuities by the codicil, though given to the ſame perſons who were pecuniary legatees in the

(*e*) Curry *v.* Pile, 2 Bro. CC. 225. (*f*) Swinb. pt. 7. ſect. 21. p. 570. (*g*) Maſters *v.* Maſters 1 P. Will. 421, 423.

will, and though of greater value, ſhould not be taken to be a ſatisfaction of the pecuniary legacies in the will, becauſe the annuities were not *ejuſdem generis*, and the annuitants might die the next day after the death of the teſtatrix: and nothing being more uncertain than life, conſequently the latter gifts, inſtead of being a bounty, might be a prejudice, if taken to be in ſatisfaction of the legacies by the will. That the codicil was part of the will, and proved as ſuch; and that the greater pecuniary legacy given by the codicil to the ſame perſon who was a pecuniary legatee in the will, ſhould not be taken to be a ſatisfaction, unleſs ſo expreſſed that it was; as if both the legacies had been given by the ſame will; and it ſeemed a circumſtance tending to prove, that the teſtatrix intended additional bounties, inaſmuch as ſhe, after the making of the will, and before her making the codicil, had an additional eſtate from her mother.

(*b*) Lady *I. Finch*, by her will, bearing datethe 30th of *Auguſt*, 1768, gave to *Lydia Hooley*, her woman, the plaintiff, a legacy of 500l. The will was executed in the preſence of two witneſſes. By a codicil ſhe gave to *Lydia Hooley* 60l. to be paid her; ſhe afterwards made a ſecond codicil, dated the 28th of *October*, 1769, in theſe words, "I add this codicil to my will; I give to *Lydia Hooley* 1000l." This was in her own hand-writing, but not executed before witneſſes. The plaintiff filed her bill for the legacies and the annuity. The queſtion was, whether the laſt legacy alone paſſed, or the legatee ſhould have both the 1000l. and the 500l.? The *Maſter of the Rolls* had decreed both to the plaintiff, and the defendant appealed to the *Chancellor*, who was aſſiſted by Lord Chief Baron *Smyth*, and Mr. Juſtice *Aſton*. The caſe after having been argued very much at large, ſtood over till *Hilary* term, when the court gave judgment as follows:—

Aſton, J.—"There is in this caſe no internal evidence, therefore we muſt refer to the general rule of law. The counſel applied the rules laid down in the caſe of *Beauclerk* v. the Duke of *St. Albans* (*i*). It is evident thoſe rules are not general, but go on the particular circumſtances of that caſe. It was contended there, that the fourth codicil was to ſtand in the room of the firſt. There are four caſes of double legacies; firſt, where the ſame, ſpecific thing is given twice. *Cujacius* takes a diſtinction between the ſame *res* and the ſame *quantity*. In the firſt caſe it can take place but once, *at eadem quantitas ſæpius præſtari poteſt*. Digeſt L. 22. T. 3. L. 12.—*Cuj.* op. t. 4. 381, 382. Secondly, where the like quantity is given

(*b*) Hooley *v.* Hatton, 1 Bro. CC. 390—notis. (*i*) 2 Atk. 636, *infra*.

twice;—Lord *Hardwicke*, (in *Beauclerk* v. the Duke of *St. Albans*) alluding to the particular circumſtances of the caſe laid down, one only ſhould be taken, unleſs an intention appeared to the contrary.—Digeſt 34. T. 4. L. 9.—But nothing can be collected from hence, as the title of the digeſt muſt be attended to, which expreſsly ſays, *animo adimendi*.—*Godolphin*'s Orphan's Legacy, pt. 3. c. 26. ſect. 46.—*Swinburne* 526, 530, (ed. 1728,) where 100l. & 200l. legatee intitled to both. The doctrine from repetition of two equal ſums in one will being bad, and in a will and codicil being good, attributing the former to forgetfulneſs, is ſtrange. The caſe of the *Slaves*, Dig. 34. T. 1. L. 18. and that in 2 *D'Agueſſeau*, pleading the firſt, page 21, are upon entirely different principles. It would be ſtrange to ſuppoſe Lord *Hardwicke* applied this as a general rule which would be inconſiſtent with his recognizing (as he did expreſsly) the authority of *Swinburne* 526, 530; but ſaid that the caſe before him was different, from the internal evidence. In regard to the caſes in the *Roman* law.—Firſt, where equal ſums are given in two diſtinct writings, both ſhall paſs by the *Roman* law, and the deciſions of this court are agreeable thereto. Digeſt 22. T. 3. b. 12, and *Gothofred*'s note *in diverſis ſcripturis*. Digeſt 30. T. 1. l. 34. *in eâdem ſcripturâ*. *Cujacius* 4. 381. diſtinguiſhes between a *corpus and quantity*, *Voet.* on the 31, and 32 Digeſt, *Godolphin* part 3. c. 26, ſect. 46. *Swinburne* 526, *Ricard traita des donations*, *Wallop* v. *Hewet*, 2 Ch. R. 70. *Newport* v. *Kinnaſton*, *Finch* 294, *Menochius de Preſump.* l. 4.—2. Ch. Rep. 58. Thirdly, as to a leſs ſum in the latter deed, as 100l. by will and 50l. by the codicil, the legatee ſhall take both, *Godalph.* part 3. c. 25. ſect. 19. *Rydout* v. *Payne*, Ch. Ca. 301. Fourthly, as to a larger ſum after a leſs, *Ricard* 421, folio edition, ſays, where they are in the ſame inſtrument, the two ſums are not blended, but the legatee has two legacies, and the heir muſt ſhew, that the one was meant to be blended with the other, the preſumption being in favour of what is written. (*k*) *Wyndham* v. *Wyndham*. (*l*) *Pit* v. *Pigeon*; (*m*) *Maſters* v. *Maſters*. The law ſeems to be, and the authorities only go to prove the legacy not to be double where it is given for the ſame cauſe, in the ſame act, and *totidem verbis*, or only with ſmall difference; but where in different writings there is a bequeſt of equal, greater, or leſs ſums, it is an augmentation, and therefore *Lydia Hooley*, is intitled to both ſums of 500l. and 1000l."

Lord Ch. Baron *Smyth*.—" I am clearly of the ſame opinion,

(*k*) Finch. Rep. 267. (*l*) Cha. Ca. 301. (*m*) 1. P. Will. 421. *ſuprà*.

and therefore shall be very short; the intention is the clearest rule, but it is admitted on all hands, that here is no internal evidence, we must therefore refer to the rule of law. The rule of law is different with respect to a *corpus*, and to *quantities*: on the other side was quoted, the *Mayor of London* v. *Russel*, *Finch* 290, where the words were satisfied by some goods. In the Duke of *St. Albans* v. *Beauclerk*, the last codicil was evidently the same as the first."

Lord *Chancellor*.—"It would be sufficient for me to say I am of the same opinion, if Mr. Justice *Aston* had not referred to me with respect to some of the cases. By the *civil* law, where two pecuniary legacies were given by the same will, the legatee must prove it was to be doubled; but where the two bequests are in different writings, there the presumption shall be in favour of the legatee. No argument can be drawn in the present case from internal evidence, we must therefore refer to the rule of the *civil* law. In the case of the Duke of *St. Albans* v. *Beauclerk*. Lord *Hardwicke* laid down the rule as applicable to that case, and not as a general rule. 'This question (said Lord *Hardwicke*) divides itself into different parts; I am of opinion that upon the reason of the thing, and according to the best writers, these legacies being in different writings will make no difference in this case.' Neither was it put upon being one instrument, certainly they are different. 'And as the will and codicil make but one will,' Lord *Hardwicke* quoted *Gothofred*, *immo hæres priorem probare inanem esse non tenetur*, but did not speak of proving both will and codicil as he is represented to do in the report. Then Lord *Hardwicke* considered the internal evidence, and added, 'by the power reserved in her will, she has shewn her intent to make them one instrument,' which words are omitted in the report. Lord *Hardwicke* probably thought that Sir *Joseph Jekyll*, in *Masters* v. *Masters*, gave two reasons where he seems to give only one; I will hazard a conjecture upon the pointing of the report, 1 P. Will. 424, the semicolon in the passage 'should not be taken as a satisfaction, unless so expressed; that it was &c.' was wrong placed, and should be after the words, 'that it was,' by which means the passage would stand, 'should not be taken as a satisfaction, unless so expressed that it was; as if both legacies had been given by the same will, &c.' This case, therefore, is an authority in point, because there are two distinct writings. So in *Wallop* v. *Hewet*, 2 Ch. Rep. 37. The register's book shews, that the case went upon the general doctrine of the *civil* law, and not on any internal evidence." His lordship further cited *Wyndham* v. *Wyndam*, Master of *Christ's Hospital*, (alias Mayor of

London,) againſt *Ruſſel* (*o*), *Newport* v. *Kinnaſton*, *Pit* v. *Pigeon*, 3 *Huber Prælectiones*, *Leg. Civ.* 122, and *Sterling*'s caſe (in *Scotland*) 2 *Fountainhall*, 231, and concluded with ſaying, I have, therefore, the ſatisfaction to think we confirm Lord *Hardwicke*'s opinion.—The decree of the *Maſter of the Rolls* affirmed.

4. If legacies given by will and codicil to the ſame perſons are *primâ facie*, to be conſidered accumulative, *à fortiori*, the latter will be ſo, when mentioned to be given for a particular reaſon or purpoſe; or are given by an additional deſcription of the legatee, ſo as to particularize him as a peculiar object of favour, —Thus,—

(*p*) *A.* by his will having ordered his real eſtate to be ſold by his executors, and the money applied in aid of his perſonal eſtate, gave ſeveral legacies, and among the reſt to *Nicholas*, and *Mary Layton*, the children of his nephew *Iſaac Layton*, 500l. each. By a codicil written under his will, he gave to *T. Aſhby* 20l. and to "*Nicholas Layton*, that I put apprentice to a grocer, near *Cripplegate*, 500l." The *Nicholas Layton*, mentioned in the codicil, was the ſame *Nicholas Layton* to whom 500l. was given by the will. And the bill prayed that he might be decreed entitled to only one of the ſums of 500l. It was argued in ſupport of the prayer of the bill, that the ſums being equal, the legacy in the co dicil was a mere repetition of the bequeſt in the will, and that all the parties being in equal relationſhip to the teſtor, he meant them equal bounties: that the rule was when the ſame preciſe ſum is given in the will and codicil, it is mere repetition not duplication, the Duke of *St. Alban*'s v. *Beauclerk*, 2 Atkins 636 (*q*).—To this it was anſwered, that the caſe of the Duke of *St. Alban*'s v. *Beauclerk*, ſtood upon the particular circumſtances; the will reſerved the power to make a codicil, ſo that the will and the codicil became one act. That *Swinburne* in the paſſage there cited, (part 7. c. 20. fol. ed. 526.) ſaid that the will and codicil were diſtinct inſtruments, and that a legacy given in each was accumulative. That it was ſo determined in *Hooley* v. *Hatton*, before Lord *Bathurſt*, Hill. 1773 (*r*). And by Lord *Thurlow*, C. "There is no occaſion for any further argument as to the point in this cauſe, for I take the rule to be eſtabliſhed: a doubt however has ariſen as to a diſtinction taken between this and the caſe reported. The caſe of *Hooley* v. *Hatton* was examined with abundant care, and it is unneceſſary to repeat the caſes after reading the very able opinion of Mr. Juſtice *Aſton*, which contains the whole

(*o*) Finch 290. (*p*) Ridges v. Morriſon, 1 Bro. CC. 389. (*q*) *Infrà*. (*r*) *Suprà*.

doctrine of the law upon the ſubject. The rule there laid down ſeems to be this, that where a teſtator gives a legacy by a codicil as well as by a will, whether it be more, leſs, or equal, to the ſame perſon who is a legatee in the will, ſpeaking *ſimpliciter*, it is an accumulation, and it is incumbent upon the executor to produce evidence to the contrary, if he conteſts ſuch accumulation: On the other hand the *rule* of *excluſion* has gone upon very ſlight grounds according to former authorities. The common caſe where the legacies have not been held to be accumulative, is where the ſame *corpus* (according to the Digeſt) is given twice to the ſame perſon, the ſecond legacy *nil operatur*, becauſe it cannot be given more than once. Where the ſame quantity has been given, and the ſame cauſe, or no additional reaſon aſſigned for a repetition of the gift, the court has inferred the teſtator's intention to be the ſame, and rejected the accumulation: but where the ſame *quantity* is given, with any additional cauſe aſſigned for it, or any implication to ſhew, that the teſtator meant that the ſame thing *prima facie* ſhould accumulate, the court has decided in favour of the accumulation. In the preſent caſe it happens that an additional cauſe or mark of favour has been mentioned in the codicil, which proves that the teſtator meant and intended an accumulative legacy. Conſidering the ſlight inferences made in former caſes, (and which I muſt confeſs have tended to throw property into jeopardy and uncertainty;) ſuch an inference as ariſes in this caſe is ſufficient to turn it the other way, and to induce the court to ſay, that it operates as an accumulation. In the will, the legacy of 500l. is given to *Nicholas Layton*, (the teſtator enumerating him among the other children of *Iſaac Layton*) upon the general conſideration of favour which the teſtator bore towards the family: the other legacy of 500l. in the codicil, is given with this additional mode of deſcription, adjoined to it, 'to *Nicholas Layton*, the child whom I have put out an apprentice,' which circumſtance marks the legatee as a peculiar object of favour, and conſequently ſuch an inference of the teſtator's intention, as to induce the court to ſay, it is an additional legacy."

Upon the ſame principle, when the proviſions in the will and codicil, are *non ejuſdem generis*, as where one is given as a pecuniary legacy and the other by way of annuity (*s*), or when the legacy by the codicil is given upon a contingency and that in the will is abſolute; both proviſions muſt be ſatisfied.

(*t*) *A.* in 1794, after ſeveral legacies bequeathed to *William*

(*s*) Maſters *v.* Maſters; *ſuprà*. (*t*) Hodges *v.* Peacock, 3 Veſ. Jun. CC. 735.

Hodges his ſon by his firſt wife 150l. ſterling; and alſo gave to him the ground-rents of two leaſehold houſes in *Great Cumberland Place*. By a written paper dated the firſt of *May*, 1795, ſigned by the teſtator, and intitled "Inſtructions and directions to my friends and executors," he after ſtating of what his property conſiſted, proceeded thus, "By the arrangement now made in my will and codicil I hope the legacies given to my three children *Mary*, *Catherine* and *Wickens Hodges* will be as nearly equal as poſſible, eſpecially when *Wickens* is of the age I mean he ſhould be, during his mother's life, that is 150l. a-year a-piece, I mean it ſhould be ſo, and after their mother's death, the remaining unappropriated part of what I poſſeſs to be equally divided among them fairly, ſhare and ſhare alike. As to my ſon *William Hodges* he has ſpent firſt and laſt about 4500l. in what he began buſineſs with, in what we have given him ſince, in what my ſiſter has given and will give him, in what I have given and will give him and his children, and what my ſiſter has engaged to pay for him at her death, and the continual expences Mr. *Pratt* has been at in ſupporting his family, and what he farther will receive at Mr. *Pratt*'s death; all theſe things will probably turn out firſt and laſt to make his fortune perhaps equal, at leaſt to any of my other children; I mean not to ſhew any partiality, I only mean to make ſome diſtinction between the dutiful and undutiful, the deſerving and undeſerving, this idea is at leaſt conſonant to my idea of the rules of common juſtice, and is the beſt apology I can make for the ſeeming apparent difference in the diſpoſal of my property." By a codicil made in *July*, 1795, the teſtator gave legacies to his children by his ſecond wife, to whom he had given legacies by his will; with a declaration that the legacies given to them by the codicil were in addition to thoſe legacies given them by his will. The codicil then proceeded thus; "I give unto my ſon *William Hodges* by my firſt wife, 150l. if he be living, and in caſe of his death before the deceaſe of my preſent wife, I give the ſaid *William Hodges*, 150l. to be equally divided among his five children, or ſuch of them as may be then living, ſhare and ſhare alike. I revoke the demiſe of the two ground-rent houſes in *Great Cumberland Place*, which I had given to my ſon *William* till after my wife's death, and when that event takes place, they are to come into his poſſeſſion, and he is to take and enjoy the rents for his own uſe and his heirs."—The bill was filed by *Hodges* claiming both the legacies of 150l. under the will and codicil: And by the *Maſter of the Rolls*, "Upon what principle am I to hold this a ſubſtitution? It is not the ſame legacy, but quite a different thing, a *contingent* legacy, for that muſt be the conſtruction: it cannot mean, if he be living at the teſtator's death.

I am not at liberty to ſuppoſe, his intention was the ſame as in that memorandum, for as he made a ſubſequent codicil, I cannot take into conſideration his intention on the 1ſt of *May non conſtat*, that intention might not have been totally laid aſide. How do the defendants get over this: why did he not revoke the legacy, as well as the diſpoſition of the ground-rents, if he meant the ſame as to the legacy? I am of opinion, I cannot make it a ſubſtitution or a revocation. Declare the plaintiff intitled to the one legacy, as a preſent legacy: to the other, in caſe he ſhall be living at the death of the teſtator's wife; if not, then among his children, and he muſt have the coſts."

The above rule of the Court of Chancery, relating to legacies given by will and codicil to the ſame perſon being accumulative, is founded purely upon *preſumption*, and may be repelled by parol evidence, ſhewing a contrary intention in the teſtator, but the *onus* of making out ſuch proof is thrown upon the executor and not upon the legatees (*u*);—and if any internal evidence can be collected from the ſecond inſtrument, indicating an intention in the teſtator inconſiſtent with the preſumption of the ſecond gift being accumulative, that preſumption will be repelled; as in inſtances where the codicil is a ſimple repetition of the will, with the addition of a legacy or more; or when it appears that the latter inſtrument was made for the purpoſe of explaining or better aſcertaining the legacies bequeathed by the former, and the like;— 6

(*x*) *A.* by her will in 1734, after diſpoſing of part of her perſonal eſtate, as to the reſidue, thus expreſſed herſelf, "My intention is to diſpoſe thereof by a codicil or codicils ſigned by me, which codicil or codicils I do direct and appoint to be part of, and to have the full effect of my laſt will and teſtament, notwithſtanding any defect in point of form, or otherwiſe." In *October*, 1738, ſhe made a codicil; in 1740, and 1741, ſhe made two others, not to the preſent purpoſe: in *September*, 1741, ſhe made a fourth codicil, under which the particular legatees claimed additional legacies: but the reſiduary legatee contended, it was by the frame and meaning of it intended to be ſubſtituted in the place of the firſt codicil. After long arguments, Lord *Hardwicke* declared, he thought it a caſe of very great difficulty, and took time till the 6th of *July*, 1743, when he delivered his opinion, ſtating fully the two codicils, the material parts of which were as follows, comparing each article with the oppoſite column;—

(*u*) Ridges *v.* Morriſon, *ſuprà*. (*x*) The Duke of St. Albans *v.* Beauclerk, 2 Atk. 636. See Lord *Bathurſt*'s obſervations upon this caſe in Hooley *v.* Hatton, *ſuprà*.

First Codicil.

By virtue and in purſuance of the power reſerved in my laſt will and teſtament, I do declare that this writing ſhall be a codicil to and part of my will. I give and bequeath, *viz.*

To Lord *Henry Beauclerk* . . 1000l.
To Lord *George* . . . . . 1000l.
To Lord *Aubery* . . . . . 1000l.
To Lord *Vere* 100l. worth of either pictures, china or japan.
To Lord *Sidney* 100l. worth of either pictures, furniture, or plate.
To Lord *James* 100l. of plate, books or furniture.
To Miſs *Caroline* my ſingle ſtone diamond ring.

To my eldeſt ſon, my ruby ring.
To his wife my emerald ear-rings.
To Lady *Die* my ruby ear-rings with pearl-drops.
To *Webb* my woman 500l. for her diligent, honeſt, faithful ſervice.
To *Catharine Dickens* . . . 200l.
To *Die Wiſe* . . . . . 20l.
To *James Buchanell* . . . . 50l.
To *Biar* the cook . . . . . 50l.
To all her ſervants one year's wages.
To ſeveral perſons legacies of china.
To ſeveral perſons ſmall legacies, both ſpecific and pecuniary, of whom no notice is taken in the fourth codicil.
And now I deſire that what remains in money, &c. may be applied to the beſt uſe for the advantage and increaſe of Miſs *Caroline Beauclerk*'s fortune, which I leave to the fidelity, diſcretion and care of my executors and ſons, Lord *Sidney*, *Vere*, *Henry*, *George*, and *James*.

Fourth Codicil.

The ſame introduction, *By virtue*, &c.

To Lord *Henry* . . . . . 300l.
To Lord *George* . . . . . 300l.
To Lord *Aubery* . . . . . 300l.
To Lord *Vere* 100l. worth of either pictures, china, japan or furniture.
To Lord *Sidney* 100l. worth of either pictures, plate, or furniture.
To Lord *James* 100l. worth of furniture, china or plate.
The legacies to Miſs *Caroline*, her eldeſt ſon, his wife, and Lady *Die*, in the ſame words as by the firſt codicil.

To my woman, *Webb*, 600l. for her diligent, honeſt, faithful ſervices.
To *Catharine Dickens* . . . 200l.
To *Die Wiſe* . . . . . 100l.
To *James Buchanell* . . . 50l.
To *Francis Biar* the cook . . 50l.
To *T. Jones*, 20l. and to the reſt of her ſervants one year's wages.
To Lady *Diana* all her china.

And now I deſire that whatever remains in money, &c. may be applied to the beſt uſe for the advantage and increaſe of Miſs *Caroline Beauclerk*'s fortune, which I leave to the diſcretion, care, and fidelity of my executors and ſons, Lords *Vere*, *Sidney*, *George* and *Henry*.

"Upon theſe two codicils, the principal queſtion that has been made, is, whether the legacies given by the fourth codicil to the ſame perſons to whom legacies are alſo given by the firſt, ought to be conſidered as additions to, or ademptions, or variations of thoſe legacies given by the firſt; and this queſtion divides itſelf into different parts, according to the nature of the legacies, *viz.*—*Firſt*, where the ſame ſpecific thing or *corpus* is given by both codicils; for inſtance, the ruby ring, there, in the nature of the thing, it can be but a repetition, there being no pretence that there were two ruby rings, or the like. *Secondly*, where legacies of the ſame ſum of money, or of the like quantities or values of things are given by both, if theſe had been inſerted in the ſame writing, all the books of the civil law agree they would be only repetitions and not additions or duplications, and in the reaſon of the thing, and

according to the beſt authorities, theſe legacies being in different writings will make no difference, [in this caſe (*y*)] unleſs it could be ſhewn, it was the intention of the Dutcheſs to make them additions; inſtead of that, I think her intention appears to the contrary. *Thirdly*, when legacies of greater ſums, values, or quantities, are given by the laſt, than by the firſt, I think this falls under the ſame rule, *viz.* that they are not additional but augmented or increaſed legacies. *Fourthly*, where legacies of leſs ſums or quantities, or values, are given by the laſt, than by the firſt; I think theſe are not additional, but according to the circumſtances, and the intention of the teſtatrix, ademptions or diminutions *pro tanto*. My reaſons are borrowed from the text civil law, which (as it often happens) takes theſe differences more rationally than the commentators, and in this I have been aſſiſted by an eminent civilian: That text puts it all along upon the intention of the teſtator, and on the will and codicil making but one inſtrument; it turns the proof rather on the legatee than the executor. *Digeſt.* Lib. 30. T. 1. *De legatis et fidei commiſſis, lex* 34. *Si eadem res ſæpius legatur in eodem teſtamento*, &c. *uſque ad finem.*—*Digeſt*, Lib. 34. T. 4. *De adimendis vel transferendis legatis.* Lex 32. Dis. Lib. 22. T. 3. *De probationibus et præſumptionibus.* Lex 12. *De legato in teſtamento et in codicillis relicto.* In *Gotofred*'s note upon this law, he lays it down that the heir is not bound to prove both the will and codicil. There is another law in the *Digeſt* Lib. 31. T. 1. *De legatis et fidei commiſſis, lex* 47. *De duobus exemplariis Binæ tabulæ, teſtamenti eodem tempore exemplarii cauſâ ſcriptæ, ejuſdem patrisfamilias proferuntur, in alteris centum, in alteris quinquaginta aurei, legati ſunt Titio; utrumque legatum nullo modo debetur, ſed tantummodo quinquaginta aurei.* There is a law in the *Code* more appoſite than any yet mentioned, Lib. 6. T. 36. *De codicillis* Lex 3. *De codicillis contrariis, cum proponatis pupillorum veſtrorum matrem diverſis temporibus ac diſſonis voluntatibus duos codicillos ordinaſſe; in dubium non venit id, quod priori codicillo inſcripſerat, per eum in quem poſtea, ſecreta voluntatis ſuæ contulerat, ſi a prioris tenore diſcrepat, et contrariam voluntatem continet, revocatum eſſe.* It appears to me from hence, that the true rule which reſults from all theſe paſſages in the *Code* and *Digeſt* is this, that the apparent intention of the teſtator muſt govern in double legacies, and though moſt of the commentators ſay, the proof is to lie on the other ſide, yet they too put it upon the intention. This being ſo, conſider ſecondly the internal evidence that appears upon theſe two codicils, to ſhew it was not the intention of the

(*y*) So ſtated by Lord *Bathurſt* from Lord *Hardwicke*'s note book, in Hooley *v.* Hatton, *ſuprà*, p. 493.

teſtatrix, all theſe legacies ſhould ſtand together. [By the power reſerved in her will, ſhe has ſhewn her intent to make them one inſtrument (z).] The frame of the will is conſiderable, for ſhe gives no legacies by that, but ſhews her intention to give all by the codicil, and though a codicil is in its nature part of the will, and an extenſion of the intention of the teſtator, yet it is made ſtronger by this expreſſion of hers' *et ineſſe videtur.* I have looked into a large number of the commentators upon the civil law, who, though they have thrown a great cloud upon the text, yet ſeem to agree in this, that where it is in the *ſame writing*, there can be but one legacy demanded, and here ſhe has made no codicil, but under the power reſerved to her by the will. But what creates a more material obſervation, is, that ſhe has here in many inſtances given the ſame ſpecific things by both codicils; and the quantities and values of the goods are, as to two thirds, the ſame, and in theſe variant only in a ſingle circumſtance; for inſtance 100l. worth of *plate, books or furniture* in one, and 100l. worth of *furniture, china, or plate* in the other; now can it ever be imagined that ſhe would have done this, if ſhe intended to give two legacies. As to Lord *Vere*, her meaning muſt be to extend his election as to other ſorts of furniture; for in the firſt codicil, it is to Lord *Vere Beauclerk* 100l. worth of *either pictures, china, or japan*, and in the fourth codicil to Lord *Vere Beauclerk* 100l. *worth of either pictures, china, or japan, or furniture.* Another reaſon and ſtill ſtronger ariſes out of the body of the codicils themſelves, and that is the legacies to her ſervants, and particularly to her woman *Webb*. By the firſt codicil ſhe ſays, I give to *Webb, my woman, a legacy of* 500l. *for her diligent, honeſt, faithful ſervice*: By the fourth codicil ſhe ſays, *I give to my woman Webb a legacy of* 600l. *for her diligent, honeſt, faithful ſervice.* Can it be conceived that ſhe would give theſe two legacies to Mrs. *Webb* and all for the ſame cauſe. Now the commentators on the civil law agree, that where another legacy is given for the ſame cauſe, though in different inſtruments, there ſhall not be a double legacy: *Minochius de Preſumptionibus in the Margin of Swinburne, 4to ed.* 201. As to the legacies of one year's wages to her ſervants, which is an ordinary gift from perſons of rank, it can never be imagined that ſhe intended to give more, and therefore this is a ſtrong corroboration of my opinion as to the point in general. As to the legacy of the reſt and reſidue to Miſs *Caroline Beauclerk*, which is *totidem verbis* the ſame in the firſt and fourth codicil, it is only a *repetition*, and may ſerve to explain her meaning as

(z) Said by Lord *Bathurſt* in Hooley *v.* Hatton, to be omitted in this report.

to all the other legatees, and makes it manifeſt ſhe intended to *ſubſtitute* one codicil in the place of another. Upon the whole with regard to the legacies of goods or money, where the ſecond is leſs, it muſt be conſidered as a repetition only, and conſtrued in diminution of the former *pro tanto*; but where it is greater, then as an augmentation or addition to her bounty. The greateſt difficulty is, as to a legacy given to Mr. *Wiſe*, by the firſt codicil, (ſubſequent to the giving therein legacies of 1000l. each to three of her ſons, as aforeſaid,) in theſe words, 'I now allow of 20l. to Mr. *Wiſe* out of the 1000l. I leave to my three ſons, to be paid quarterly for his life, or till ſome place or other proviſion be made for him,' no manner of notice being taken of him in the fourth codicil, he is conſequently to have his 20l. a year, but then out of what fund muſt it come? The two ſons' legacies of 1000l. each, being now reduced to 300l. each; and the third (Lord *Aubery*'s) lapſed by his death in the life of the teſtatrix, the ſtrict rule of equity muſt be obſerved, *viz.* as the ſons' legacies are diminiſhed, in the proportion of three tenths each, let each of them pay three tenths only of the 20l. *per ann.* and the other ſeven tenths be paid out of the reſidue of the perſonal eſtate, which is augmented by the variations. I ſhall but briefly conſider the caſes which have been cited againſt the opinion I have given with regard to the *double* legacies. The firſt authority was *Swinburne*, part 7. c. 20. fol. ed. 550, who ſays, that where a certain quantity is twice bequeathed, it is twice due, if in two diſtinct writings, as in a *will* and *codicil*, and puts it on their being in two diſtinct writings; and it is true, ſome of the authorities are ſo, but here the codicil being let in as part of the will, it is otherwiſe: and *Swinburne* himſelf, in the fol. edit. 554, puts the caſe, that if the teſtator bequeath to one man 100l. and afterwards in the *ſame teſtament* bequeath to the ſame man 100l. the ſecond diſpoſition is underſtood to be but a repetition of the former and all but one legacy, &c. and afterwards in the ſame paragraph he ſays, where two equal ſums be left to one perſon, the one quantity in one writing, and another quantity in another, ſuppoſe 100l. in the teſtament, and another 100l. in the codicil, here the legatary may recover 200l. as two ſeveral legacies, except the *executor* prove the teſtator's meaning to be contrary. Now in the preſent caſe, this is plainly proved by the beſt kind of evidence, the words of the will itſelf. *Menochius* cited in the margin of *Swinburne*, 555, ſays *ſi ob eandem cauſam quantitas ſit uni in diverſis ſcripturis relicta, (puta alimentorum cauſâ centum relicta ſunt) illa centum tantum ſemel præſtari debent; Menoch. Preſumpt.* L. 4 Præs. 128. *n.* 14. I cannot ſee the force of that particular *alimentorum cauſâ*, for why may not the teſtator double that, as well as

any thing elſe. Another authority cited againſt my opinion is the caſe of *Maſters* v. *Maſters* (*a*) before Sir *Joſeph Jekyll*. The firſt reaſon there given in *page* 423, will not ſupport the determination, as it is plain by all the books of civil law, where two legacies are given under the ſame will, that one of them is void, and the only doubt there about legacies to the ſame perſon, is, where they are given in different inſtruments, and Sir *Joſeph Jekyll* ſeems rather to have gone on the concluding reaſon founded on the additional eſtate, which was a very material circumſtance, and if it had been proved here, there was any conſiderable variation in the teſtatrix's fortune, it would be very material; but as it is probable that he had not time to look into the books of civil law ſo well as I have done now; and as in the caſe put by *Swinburne*, there was nothing of that internal evidence which is here; in the decree which I ſhall make I declare, that the legatees here are intitled only to the legacies under the fourth codicil, and ſhall give theſe directions to the regiſter. A queſtion ariſing on the conſtruction of the firſt and fourth codicils to the teſtatrix's will, whether ſuch perſons, to whom any pecuniary legacies, or any legacies conſiſting in quantity or value, in plate, books, japan, china or furniture, or any of them given by both the ſaid codicils, are intitled to both the ſaid legacies, or only to one of them; I declare that ſuch perſons are not intitled to both, but only to the legacy given by the laſt codicil."

(*b*) *B.* by her will gave ſeveral legacies, among others, to *Mary Call* 10l. alſo to *Mary Wooldridge* and *Barbara Smith* other legacies. By a codicil in 1768, *B.* gave to *Mary Call* 40l. inſtead of 10l. in the will; to Mrs. *Wooldridge* for her and her brother, 100l.; to *Barbara Smith* 200l. By a ſecond codicil in 1777, *B.* gave to *Mary Call* 40l. inſtead of 10l. in the will; to *Mary Wooldridge* for herſelf and family 100l. to *Barbara Smith* 300l. The bill prayed that the ſecond codicil might be declared to have revoked the firſt, and for that purpoſe it was contended that the ſecond codicil was made under a variation of circumſtances to enlarge ſome of the legacies, the teſtatrix conſidering the firſt codicil, as being to be immediately deſtroyed after the execution of the ſecond. To prove which was offered the evidence of *Jackſon* the attorney, who prepared the ſecond codicil, which being oppoſed, Lord *Loughborough* ſaid, that if the reading of the evidence was oppoſed there, it had better be proceeded upon in the eccleſiaſtical court, for a repeal of the probate of the codicil; which evidence would have been a ground to exclude the codicil from the probate. The decree pronounced by the Lords Commiſſioners

(*a*) *Supra*, and approved by Lord *Bathurſt* in Hooley *v.* Hatton, *ſupra*. (*b*) Campbell *v.* the Earl of Radnor, 1 Bro. CC. 271.

was, that the second codicil was a mere substitution for the first, and therefore that the defendants were intitled to the legacies given by the first codicil only.

(*c*) *C.* made her will in 1779, and afterwards added four codicils, of which the two first contained legacies to the same persons very nearly similar, and in almost the same words. One of the questions was, whether the legacies in the second codicil were to be considered additional or as mere repetition. The first codicil was dated in *April*, 1780, and was in the hand-writing of the testatrix. It was to the following effect; "Codicil to my last will and testament which I desire to be taken as part thereof: I give to *Peter Tricket*, of *Craven-street*, 100l.; to *William Pollock*, of *Downing-street*, 100l. to *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, 600l. 3-per cent consolidated Bank Annuities with the dividends, to be accumulated from my death till she attains the age of 21; to *Robert Woodford* 500l.; to *Judith*, another daughter of *John Thackwell*, 600l. stock, with the dividends to accumulate till she attains 21; to the four younger daughters of *John Thackwell* 400l. each in stock, with the dividends to accumulate till 21, and if any of the above daughters of *John Thackwell* die before 21, their portions to be divided among the rest; to *George Elliot* 100l. over and above what I have given him by my will." The legacy to *Elizabeth Thackwell*, as it stood originally in the first codicil, was 600l. stock generally, but had been altered by striking out the word *stock*, and interlining in the hand-writing of *Robert Woodford* the words "3-per cent. consolidated Bank Annuities." The second codicil was in the hand-writing of *Robert Woodford*, dated in *May*, 1780, and to the following effect; "Codicil to my last will and testament which I desire to be taken as part thereof. I give to *Peter Tricket*, of *Craven-street*, 100l.; the same to *William Pollock*, of *Downing-street*; to *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, 600l. 3-per cent. consolidated Bank Annuities, and I order my executors to accumulate the dividends for her benefit, to be paid with the principal to her at 21; the same to *Judith*, another daughter upon the same terms; 2000l. 3-per cent. consolidated Bank Annuities to the other four daughters of *John Thackwell* to be divided equally among such as are living at my decease upon the same terms, but if any die before 21, such legacies with the accumulation to be equally divided among the surviving sisters; to *Ellen Pheasant* 5l. *per annum*, during her life, *more than I have given her by my will.* To *George Elliott* 100l. *more than I have given him by my will*, if in my service at my decease." Both codicils were signed by

(*c*) Moggridge *v.* Thackwell, 1 Ves. Jun. CC. 464, 472.

the teſtatrix, but not atteſted. By the other two codicils which were written by herſelf, *Elliott* had two other legacies, *viz.* 50l. and 20l. and ſhe ſpoke of him in high terms. *Elliott* and *Pheaſant* had legacies by the will. *Woodford* died in the life of the teſtatrix. By Lord *Thurlow*, C. "The firſt queſtion is, whether theſe legacies are to be conſidered as additional, or as only repetition. That queſtion ariſes merely between the two codicils. With regard to the will the codicils are certainly additional, but the queſtion is, whether they are ſo with reſpect to each other, or mere repetition. It is true, the general preſumption is, that where a perſon leaves two different inſtruments, as a will and a codicil, or two codicils, legacies given by both to the ſame perſons are, generally ſpeaking, to be conſidered as additional; and that preſumption is upon the other ſide checked by this, unleſs there appears to be ſome intention to the contrary. I am ſorry to ſay, it is left by former determinations upon very indiſtinct grounds, and it is a great inconvenience, when a queſtion of this kind falls to be decided upon grounds not diſtinct. But it is impoſſible now to lay down a rule of diſcretion without departing from the caſes, which have eſtabliſhed firſt, that the ſecond inſtrument is additional to the firſt, becauſe *prima facie*, there is no reaſon why the ſecond inſtrument ſhould be made, unleſs the intention was to add to the firſt: but this of courſe muſt be checked by this, that if there be *evidence* (*d*), that inſtead of addition it was intended ſimply as repetition, it is not additional; and *ſimple repetition where it is exact and punctual, has been regarded as ſufficient proof that it is only intended for repetition:* but eſpecially if beyond that general article of preſumption, the ſecond affords alſo other preſumption of an intention to make it to explain the firſt; that purpoſe if it can be manifeſted and properly produced by the form of the ſecond, goes *à multo magis* to prove, that the ſecond bequeſt, given only with ſuch different terms, as ſerve to aſſiſt that purpoſe, will be conſidered as a ſtronger proof that they are the ſame legacies better and more correctly explained. I may ſtate at the outſet, that certainly it was not intended, that the ſecond codicil ſhould be a ſubſtitute for the firſt; that is clear, becauſe by the firſt there is a legacy to *Woodford*, and none by the ſecond, and there is no expreſſion in the ſecond purporting to adeem the legacies given by the firſt; and by law thoſe cannot be adeemed by an inſtrument not relating to the firſt, and ſo foreign to it as the ſecond codicil is in this caſe. If the ſecond inſtrument makes any or all a repetition, it muſt be, becauſe the ſecond legacies purport to explain the firſt; and they are ſo exactly in the ſame words as to raiſe a probability

(*d*) See Oſborne *v.* the Duke of Leeds, *infrà*.

from that circumſtance; and ſtanding in the context they are apparently an intention to recall the ſubject and repeat the inſtrument. She gave *Judith* 600l. ſtock, not ſtating what ſtock nor what fund, but leaves it uncertain; and that from careleſſneſs and ignorance, thus making it uncertain what ſhe intended to give; for that is ſo looſe, that unleſs ſhe could refer to other parts to make that certain and ſignificant, which is uncertain, it is very difficult to underſtand that part. So in the bequeſt of 400l. ſtock to each of the four younger daughters of *Thackwell*, ſhe does not ſay what ſtock. As to them, the laſt bequeſt is in expreſſion ſomewhat more exact, but it is juſt the ſame thing. The bequeſt to *Judith* in the ſecond codicil is in this way; 'the ſame to *Judith*, another daughter upon the ſame terms:' that is to correct the general phraſe *ſtock*, uſed in the former codicil, for by uſing the word, *ſame*, the ſtock is aſcertained, which it was not before. So in the legacies to the other daughters, there is a correction to ſpecify the particular ſtock. It is juſtly contended upon the bequeſts to *Elliott* and *Pheaſant*, that by the circumſtance of referring in each of theſe to the will, it is plain ſhe meant each to apply in accumulation to the will. If in other reſpects theſe codicils were ſo framed, that the preſumption would have ariſen from no other quarter, and if the legacies given by them had been upon different terms, and there was no other circumſtance to controul the inference from thence, thoſe words, 'more than I have given by my will' in the ſecond codicil might have applied to both the will and the codicil. But the ſame intereſt being given in ſo nearly the ſame terms, thoſe words fairly aſſiſt the inference, that in writing the ſecond codicil, ſhe thought ſhe was doing the ſame thing as when writing the firſt, and making a gift additional to the will only: and to the apparent reaſon for repeating the legacies to the ſame perſons may be added, if neceſſary, that the ſame perſon who wrote the ſecond codicil, began to write the interlineation upon the firſt, and found that it would too much obliterate the firſt, and probably did not wiſh, that the legacy to himſelf ſhould appear in his own hand-writing, but rather that it ſhould remain in her's, without any appearance of meddling on his part. But whatever the reaſon may be (to keep clear of too remote conjecture) it is plain, that within the reaſon of all former determinations, there is too much evidence, that inſtead of intending this as additional, becauſe there is no reaſon why ſhe ſhould make it, unleſs for the ſake of addition, there is a very diſtinct reaſon to the contrary; and that becomes much inforced, by the reference to the will only as the inſtrument under which *Elliott* and *Pheaſant* had legacies. Each,

therefore, is ancillary to the will only, and these legacies are not additional."

(*e*) *D.* by her will in 1774 gave to trustees 500l. to be invested in the public funds, in trust to pay the interest to *E. Bousfield* for life, for her separate use, and after her death to transfer the principal to and among all her children living at her decease, the children of a deceased child to take its parent's share; and if *E. Bousfield* died without leaving issue, then to transfer the same to and among all her brothers and sisters living at her death; and similar legacies were given for the benefit of the two sisters of *E. Bousfield* and their children. The testatrix made two codicils in 1776 and 1780. By the first she noticed a legacy of 500l. given in her will to *C. Hobbs*, and bequeathed to her trustees the *farther sum* of 500l. upon the like trusts for the benefit of the said *C. Hobbs*, to be paid her at such time and manner as the 500l. mentioned in the testatrix's will were directed to be paid to her;—in the second, there was no augmentation of the legacies. By the third codicil, in *May*, 1785, she gave to the three children of *E. Bousfield* then deceased, the legacy or sum of 500l. in the manner and proportions following; 200l. to her daughter *C. Bousfield*; 150l. to her son *T. Bousfield*, and 150l. to her son *G. Bousfield*, payable at their respective ages of 21, with benefit of survivorship upon the death of any under that age; and she directed that the 500l. should immediately after her death be invested in the name of one of her trustees, to be laid out for the use of the legatees in some of the public funds in manner and for the purposes therein mentioned. *E. Bousfield* died in *July* 1782, leavin gfour children, *Thomas*, *George*, *Catherine* and *Harriet*, who were all living at the date of the will. In *December*, 1782, *Harriet* died an infant, and without issue, and in 1789, *Thomas* died an infant, without issue. In *April*, 1794, the testatrix died; at which time *George* and *Catherine Bousfield* were the only surviving children of *E. Bousfield*.—Question, whether the surviving children of *E. Bousfield* were entitled to two legacies of 500l. or to a single legacy of that amount only? And by the *Master of the Rolls*, I mention the first codicil executed in 1776, in order to remark, that in that first codicil, the testatrix takes notice of a legacy she had given by her will, and there adding to the legacy given by the will, she gives expressly and *eo nomine* a farther legacy to the same person. That is not an insignificant circumstance: but it is not decisive; for the same thing was done in one of the codicils in *Hooley* v. *Hatton* (*f*): but it does strengthen the argument of those who contend, that one of these dispositions is substituted

(*e*) Allen *v.* Callow, 3 Ves. Jun. CC. 289. (*f*) *Supra.*

for the other. By the ſecond codicil ſhe does not augment any of the legacies. The queſtion ariſes upon the third codicil. The alterations that took place between the execution of the will and of that codicil, are material. The legacy given by the will is not given to any of theſe perſons as *perſonæ deſignatæ*, but in the character of children living at the death of their mother, in caſe at that time they ſhould ſuſtain that character. It is therefore only to ſuch perſons as ſhould be living at the death of *Elizabeth Bousfield*; which the teſtatrix ſuppoſed would be poſterior to her own. It is neceſſary to conſider, what would have been the effect of this legacy, ſuppoſing the teſtatrix, not acting upon the circumſtances that happened, had permitted the will to remain unaltered. I am willing to admit, that the death of *Elizabeth Bousfield*, in her life, would not have defeated the legacy to the children: though it was proſpective, yet it would have veſted in them; and the ſhare of one of them dying in the life of the teſtatrix would have fallen into the reſidue as lapſed; and then each of the ſurvivors could have taken only one fourth. Under theſe circumſtances ſhe is called upon to make a freſh diſpoſition: an event happened, that would have had the effect of taking away the full benefit of the 500l. which ſhe intended theſe children to have among them; for each would have taken only one fourth of that ſum; and ſhe ſits down to conſider what to do for them. Am I to ſuppoſe, ſhe forgot her will? It is impoſſible not to ſuppoſe, ſhe fully contemplated the ſituation of the family, and the operation of the will under the circumſtances that happened. After having in the former part of this inſtrument, where ſhe meant addition, ſaid ſo, ſhe is ſuppoſed to contemplate, that meaning the 500l. given by the will, ſtill to remain a legacy, one fourth having lapſed, ſhe gives by the codicil the very ſame ſum to the three children, the only children then living; though they with one other had been the children living at the death of *Elizabeth Bousfield*. It is impoſſible to ſuppoſe, ſhe could have meant any thing more than a diſtribution of that ſame ſum in ſuch manner, that the whole might be enjoyed by the three children. It muſt not be forgot, that though it is unequally divided, each takes a greater intereſt, than if ſhe had permitted the will to remain. It was ingeniouſly preſſed for theſe children (and we muſt in theſe caſes reſort to ſmall circumſtances) that this is not a caſe of augmentation by the will, but by a codicil: but I cannot think, that in this caſe that makes any difference. The preſumption I raiſe is from this, that in the very ſame inſtrument, where ſhe did mean additional bounty, ſhe has ſaid ſo, and when I conſider the particular circumſtances of this caſe, they are fully ſufficient to rebut the general preſumption. I agree fully with

Lord *Thurlow*, that it is much too late to contend, that *simpliciter* legacies given to the ſame perſon by two inſtruments, bearing different dates, (for that I muſt always guard it with; and I hope the eccleſiaſtical court will not go on to prove papers without date) ſhall not be an accumulation. *Hooley* v. *Hatton* is ſo fully gone into in *Ridges* v. *Morriſon* (*g*), that it is not neceſſary to ſtate it. It has not eſcaped my attention, that in one of the codicils in that caſe, but not that upon which the queſtion aroſe, the teſtatrix uſes the words 'over and above.' *Jones* v. *Semmings*, 2 H. *Black.* 213, ſhews how very ſlight circumſtances will be ſufficient to rebut the preſumption the law makes. There the ſame queſtion of double legacies aroſe in a court of law. By the will an annuity of 10l. was given to the wife *Catherine Semmings*, payable yearly. By the codicil, in which are the remarkable words, 'my farther will is,' the ſame annuity is given out of the ſame eſtate to the ſame perſon, only payable quarterly inſtead of annually. I think a great deal more argument aroſe upon that caſe than can ariſe upon this; for my judgment is, that there is internal evidence in this will and in theſe codicils, that the teſtatrix had in contemplation the different ſituation of the family; that they could not take the whole benefit ſhe intended; and ſhe ſets about making another diſpoſition more beneficial and more definite than before. Therefore, I am of opinion, ſhe meant the ſecond diſpoſition to be a ſubſtitution for the other. The word 'the,' cannot weigh in this caſe; for the teſtatrix uſes that word as to all the original legacies."

(*h*) *E.* by his will in 1778, made certain proviſions for his wife, the defendant Lady *Coote*, and gave ſeveral legacies: he directed his reſiduary eſtate to be laid out in the purchaſe of lands, to be ſettled, &c.—Soon after making the will the teſtator went abroad to the *Eaſt-Indies*, and in *October*, 1780, he made a codicil, by which he confirmed his will, and gave to Lady *Coote* 10,000l. to be paid within 12 months after his death; he alſo gave ſeveral other legacies, and appointed the plaintiff Dean *Coote* "reſiduary legatee to the ſums of money which ſhould remain after payment of his debts and legacies." In *December*, 1780, he made another codicil, by which he gave Lady *Coote* 10,000l. and repeated all the other legacies in the former codicil, in nearly the ſame words as were uſed in the former codicil, he alſo added a legacy of 5000l. to his god-daughter *A. Moukton*, and appointed his brother, the plaintiff, reſiduary legatee. The codicils were wrapt up together in a ſheet of paper. The bill was filed by the plaintiff as executor and reſiduary legatee, praying that the defendant Lady *Coote*,

(*g*) *Supra*. (*h*) Coote *v.* Boyd, 2 Bro. CC. 521, 528.

and the other legatees might accept the legacies in the former codicil, in full ſatisfaction of their legacies.—And by Lord *Thurlow*, C. "There is but one point in this cauſe, and that will be a ſhort one. *E.* by his will had diſpoſed of ſeveral real eſtates, and of his perſonal eſtate.—Afterwards going to *India*, he made a codicil to his will, dated 9th *October*, 1780, beginning with the words 'This is a codicil to the will, *&c.*' by this codicil he ratified his will, and gave a legacy to his wife of 10,000l.: he gave ſeveral other legacies, and made his brother the Dean of *Kilfenora*, reſiduary legatee.—He afterwards went to a different part of *India*, and there made another codicil, in *December*, 1780, in the ſame words with the former, and the reſiduary legacy the ſame: it contained only one alteration, the legacy to Miſs *Monkton*. It is inſiſted by the legatees, that theſe are duplicated legacies, on the other hand, it is argued, that the ſecond codicil is a mere repetition.—All the caſes were gone through in argument, from the civil, the canon, and our own law. I do not repeat them, becauſe I refer intirely to the argument of Mr. Juſtice *Aſton*, in *Hooley* v. *Hutton* (*i*), taking from it, that when the ſame legacy is given in a will and a codicil, the court generally takes it as a *double* (*k*) legacy, but that the court has not conſidered the preſumption as very ſtrong, but ſlight circumſtances have been held to control it. Where it is evident, the teſtator meant to repeat the legacies, they are not duplicated. I think here, the teſtator meant to leave but one codicil, and only to add the legacy to Miſs *Monkton*. It would be extraordinary he ſhould repeat exactly the ſame legacies, to perſons ſtanding in ſo different degrees of relationſhip to him as the ſeveral legatees, and that the reſiduary clauſe ſhould be exactly the ſame in both. The laſt codicil, therefore alone ought to ſtand." Decree for the plaintiff.

(*l*) *Latham Arnold*, having made his will on the 15th of *March*, 1777, added the following diſpoſition, bearing the ſame date, and atteſted by the ſame witneſſes. "A codicil to be added and taken as part of the laſt will and teſtament of me *Latham Arnold*, of *Newgate-ſtreet*, *London*, tobacconiſt. I give and bequeath to the Reverend Mr. *Picard*, 20l. and to the Reverend Mr. *Dean* and Mr. *Taylor*, 10l. a-piece, for mourning; and I direct the ſaid legacies to be paid immediately after my deceaſe; and I give to *Joſeph Dean*, my clerk, 200l. provided he continues in the ſervice of my executors, till my affairs are ſettled, over and beſides what may be due to him at my death, and the ſalary he may be allowed by my executors; and I give to *William Hailſton*, my footman, mourning and 100l.; to *James*

(*i*) *Supra*. (*k*) This muſt have been his Lordſhip's expreſſion, and not "as *one* legacy," as in the Report. (*l*) Barclay v. Wainwright, 3 Veſ. Jun. CC. 462.

Beckford, my coachman, mourning and 40l.; and to *Elizabeth Holmes*, mourning and 100l.: the money legacies to be paid to the said *William Hailston*, *James Beckford*, and *Elizabeth Holmes*, if they shall respectively continue in the service of my family one year after my decease; and I give to my maid servant *Martha Norton*, 5l. for mourning, and 20l.; and to each of my three other maid servants, who shall have been in my service two years at my death, 5l. a-piece for mourning; and if they shall severally continue in the service of my family one year after my decease, 10l. a-piece; and I give to *George Gamon*, my gardener, 5l. for mourning, and 10l. to be paid him immediately after my decease; and I give to *Mary Brown*, of *Warwick-Lane*, an annuity of 20l. during her life, to be paid her quarterly, in neat money, and I give to *Peter Stevenson* the elder, and *Thomas Stevenson*, 20l. a-piece, if they respectively shall continue in the service of my family one year after my decease; and I give to *William Priest*, 10l. if he shall continue in the service of myself or my family two years after the date of my will; and I give to *Miss Careless*, of *Birmingham*, 100l. to be paid immediately after my decease; and to Mr. *Goodman*, of *Deptford*, 50l. and if he shall die in my life-time, I give the said 50l. to his present wife; and I give to Mr. *Goodman*'s eldest daughter 20l.; and I give to Mr. *Seale*, of *Macclesfield*, 50l. and if he shall die in my life-time, I give the last-mentioned 50l. to his present wife; and to his son who is in partnership with him, 50l.; and to the widow of the late *William Taylor*, of *Stratford-upon-Avon*, 20l. and to *Richard Smith*, of *Deptford*, 40l. and I give to *Mary Hewson*, of *Oundle*, 20 guineas for a ring; and I give to Mrs. *Hanson* and *Richard Robinson*, 10l. a-piece, and to *John Barratt*, *John Topp*, *James Stalion*, and to the man called *Jack*, who works at my mills at *Mitcham*, 5l. a-piece, if they shall respectively be in my service at the time of my decease; and I direct all the last-mentioned legacies to be paid immediately after my death; and I give to *John White*, and *Peter Jessop*, mourning, and I also give them 10l. a piece, if they shall respectively continue in the service of my family one year after my death."—Codicil, dated the 7th of *December*, 1778, attested by two witnesses.—"A codicil to be added to, and taken as part of the last will and testament of me *Latham Arnold*, of *Newgate-street*, *London*, tobacconist, bearing date the 15th of *March*, 1777." After several directions relative to carrying on his trade for the benefit of his grand-children, the testator proceeded thus;—"Also I give to the Rev. Mr. *Brown*, of *Hampstead*, the Rev. Mr. *Taylor*, and the Rev. Mr. *Deane*, of *Huddlescough*, 10l. a-piece for mourning, and to Mrs. *Sumner* and Mrs. *Nelson*, 20 guineas a-piece for mourning, which legacies I direct to be paid immediately after my decease. I give to *Joseph Deane*, my clerk,

(who is now in my ſervice at 100l. a-year) the ſum of 10l. for mourning, and direct the farther annual ſum of 100l. to be paid to the ſaid *Joſeph Deane*, ſo long as he ſhall continue in the ſervice of my executors, and the ſaid *Martin Pearkes*, beſides his preſent ſalary, which annual ſums of 100l. and 100l. to the ſaid *Joſeph Deane*, I declare ought to be, and it is my intention ſhould be, paid in the firſt place out of the profits of the trade at large, before any diviſion is made of the profits thereof; and I give to Mr. *Samuel Waterman*, 100l. in addition to the legacy given him by my will. I give to Mr. *Miles Penfold*, 20 guineas for mourning; I give to *William Hailſton*, my footman, 5l. for mourning, and alſo 100l; and to *James Beckford*, my coachman, 5l. for mourning, and alſo 45l.; and to *Elizabeth Holmes*, 5l. for mourning, and alſo 100l. and all my linen-apparel; and to my maid-ſervant *Martha Norton*, 5l. for mourning, and alſo 45l. and to my now cook at *Hampſtead*, 5l. for mourning, and alſo 15l; and to *William Prieſt*, my other footman, 5l. for mourning, and alſo 10l.; and which legacies to my ſaid ſervants are only to be paid to them, provided they are in my ſervice at the time of my death; and I give to my two other maid-ſervants 10l. each, provided they ſhall have lived in my ſervice three years previous to my death; and I give to *George Gamon*, my gardener, 5l. for mourning, and 30l.; and I give to *Mary Brown*, of *Warwick-lane*, an annuity of 20l. during her life, to be paid quarterly in neat money; and I give to *Peter Stevenſon* the elder, and *Thomas Stevenſon*, 30l. a-piece, if they ſhall reſpectively continue in the ſervice of my family after my death; and I give to Miſs *Careleſs*, of *Birmingham*, 100l. and to Mr. *Goodman*, of *Deptford*, 50l. and if he ſhall die in my lifetime, I give the ſaid 50l. to his preſent wife; and I give to Mr. *Seale*, of *Macclesfield*, 50l. and if he ſhall die in my lifetime, I give the ſaid 50l. to his preſent wife; and I give to *John Smith*, of *Brickhill*, 75l. and to his ſon who is in partnerſhip with him, 75l.; and to the widow of the late *William Taylor*, of *Stratford-upon-Avon*, 20l.; and to *Richard Smith*, of *Deptford*, 50l.; and I give to *Mary Hewſon*, of *Oundle*, 20 guineas for a ring; and I give to Mrs. *Hanſon*, and *Richard Robinſon*, 15l. a-piece; to the man called *Jack*, who works at my mills at *Mitcham*, 10l.; which three legacies laſt-mentioned, are to be paid, provided ſuch legatees are reſpectively in my ſervice at the time of my death; and I give to *Peter Jeſſup*, 5l. for mourning, and alſo 30l. if he ſhall continue in the ſervice of my family after my death; and I give to *John Bate*, of *Sandhouſe*, near *Brickhill*, 50l." The teſtator after diſpoſing of ſome ſtock, added, "and in all other reſpects which is not altered or varied by this codicil, I ratify and confirm my ſaid will."—*Samuel Waterman* was one of the executors, and a lega-

cy of 600l. was given him by the will.—The bill was filed to have the trusts of the will executed, and the question was, whether the legacies given by the codicil of the 7th of *December*, 1778, to the persons who were legatees under the former instrument were additional, or were substituted for the legacies given by that instrument? The legatees relied upon the difference of the legacies in the two instruments, to *Deane* and Miss *Careless*.—And by the *Master of the Rolls*, "There is no doubt that the second codicil is intended throughout and entirely as a substitution. It is now too late to deny that it is settled and acquiesced in as a rule of the court, that *simpliciter* and *primâ facie* two different instruments giving legacies, whether of the same or a larger amount, and more particularly of a different species, shall be held accumulative, and not a substitution. That was determined in *Hooley* v. *Hatton* (*m*), and it is too late now to discuss whether it was a wise determination or not. Great pains were taken in it, and Lord *Thurlow*, in *Coote* v. *Boyd* (*n*), considers it as established: but it never was established as more than a *primâ facie* rule. *Coote* v. *Boyd*, must determine this case, and is not near so strong as the argument, that this codicil is a mere substitution.—Upon the circumstances of that case, and the evidence resulting from a comparison of the two instruments, Lord *Thurlow* was clearly of opinion, the second was not accumulative. What is the evidence in this case as to the intention of the second codicil. What the testator calls a codicil to his will, bearing date the same day, seems little more than additions to his will. He gives several legacies for mourning and rings, and to servants. By the codicil of 1778, he gives legacies to every person to whom he had given legacies by the former instrument, except such as had died, or ceased to be in that character, with respect to which he had given them legacies. The second codicil gives the same or greater legacies to all except *Deane*, and the same reason is given, and the same object stated. As to rings and mourning, he gives them in both. But what is very strong and decisive, *Waterman* had a legacy by the will, not by the first codicil, and in the second codicil, a legacy is given to him in addition to the legacy by the will. If the first codicil operates, it is as part of the will, then could he have meant every one of the others as additions? As to the different circumstances of the legacies, the ingenuity of the counsel could not attach upon any instance except as to *Deane* and Miss *Careless*. There they have found some circumstances of difference. It has been argued that an annuity cannot be a substitution for a legacy, from the different nature of the interests. The only difference in the legacies to Miss *Careless*, is, that one is directed to be paid

(*m*) *Supra*. (*n*) *Supra*.

immediately after his death. Such a slight difference has never prevailed as applied to legacies: when applied to debts, it has been scrutinized strictly, in order to get rid of what I call a very absurd rule, that a legacy is considered as meant to extinguish a debt; with regard to children, it has been frequently decided, that a little difference between a portion and a legacy, as to the time of payment, shall not prevail against the presumption of an intended satisfaction. That single slight circumstance of difference in these two legacies, both pecuniary, is not sufficient to prevent what I conceive to be the clear result of the two codicils taken together, and I lay considerable stress upon this, that where the testator meant addition, he has expressed it. Therefore I think myself warranted, as Lord *Thurlow* thought, in *Coote* v. *Boyd*, to hold the second codicil a substitution for the other. As to *Foy* v. *Foy*, 1 Bro. CC. 393, n. it clearly appears, that there never was any decree in it. No such is to be found in the *Register*'s book, and according to the statement from the brief, it is impossible Lord *Kenyon* could have held it an accumulation, for there is upon the face of it an evident substitution: that case, therefore, must not be cited again, as any authority bearing upon this point."—*Foy* v. *Foy*, as stated from the brief by Mr. *Finch*, was as follows:—The testator gave to Dr. *John Jebb*, 200l. as a small token of veneration and esteem, for his many amiable virtues, and great and public spirited exertions. By a codicil, dated in *August*, 1783, the testator said, "Being uncertain whether I have remembered certain persons in my will, in the manner I wish, I therefore give to Dr. *John Jebb*, the sum of 400l. upon condition I have not left him to that amount by my will;" and he assigned much the same reasons.—By an instrument dated at *Caen*, in *Normandy*, in *December*, 1783, he began—"I do make this as my last will and testament," and after giving to *B. Hollis*, who was his executor by the former will, ——l. he proceeded, "I likewise give and bequeath, and beg the acceptance of 400l. to Dr. *John Jebb*, as a small token and testimony of my friendship." No minute of the decree was to be found.

(*o*) *G.* by his will, in *June*, 1791, devised his real and personal estate to his son and heir, the Marquis of *Carmarthen*, subject to the payment of his debts and funeral expences, and to a provision for the Duchess, and also subject (among other legacies) to the payment of 10,000l. to his son, Lord *S. G. Osborn*, upon his attaining 21, and 10,000l. each, to all his after-born children, to sons at 21; to daughters at 21 or marriage; and he directed his executor, in case of the death of his wife, during the minority of Lord *S. G. Osborn*, or during the minorities of his after-born children, to pay the annual sum of 100l. until their

(*o*) Osborne *v.* the Duke of Leeds, 5 Ves. Jun. CC. 369, 379.

reſpective ages of ſeven years, the annual ſum of 200l. from that period until ſeventeen, and the annual ſum of 300l. from that period until their reſpective portions ſhould become payable, for the maintenance and education of each of them, and he appointed the Marquis of *Carmarthen* executor.—By a codicil, in *November*, 1796, the teſtator bequeathed to Lord *S. G. Oſborn*, all the ſtocks, funds, and ſecurities for money, he might have at the time of his death, ſtanding in his name in the books of the Bank of *England*, or of the *Eaſt-India* company, or any other public company in *England*.—By a ſecond codicil, he gave ſome trifling legacies, upon which nothing aroſe. He afterwards made another codicil, unatteſted, dated in *April*, 1798, in theſe words, "Whereas, I have by my will, given the ſum of 10,000l. as a portion for Lord *S. G. Oſborn*, and having ſince otherwiſe provided for him, I now revoke the ſaid legacy, and do hereby give the ſum of 10,000l. to my dear daughter, Lady *Catherine A. S. Oſborn*, and I do hereby declare this to be a codicil to my laſt will and teſtament." The teſtator had by indentures of leaſe and releaſe of the 2d and 3d of *June*, 1797, conveyed certain hereditaments, upon truſt, (*inter alia*) to raiſe the ſum of 10,000l. as a portion for Lord *S. G. Oſborn*, to be paid to him after the death of the teſtator, when he ſhould attain 21, and in caſe he ſhould not have attained that age at the death of the teſtator, upon truſt, that the truſtees during his minority, ſhould apply all or ſo much of the intereſt of his portion, as his guardian or guardians ſhould think proper, for his maintenance and education.—The children of the teſtator at the date of the will, were the Marquis of *Carmarthen*, then Duke of *Leeds*, and two daughters, amply provided for: all by his firſt marriage; and one ſon, Sir *S. G. Oſborn*, by his ſecond marriage with the preſent Ducheſs. Another daughter, Lady *Catherine A. S. Oſborn*, was born a few weeks before the date of the third codicil. The teſtator died upon the 31ſt of *January*, 1799. The only ſtock ſtanding in his name at his death, was *India Stock*, of the value of about 3,000l.—The bill was filed by the two younger children againſt the Duke of *Leeds*, the heir at law and executor, and againſt the truſtees; the plaintiff Lord *S. G. Oſborn*, praying only directions for the appointment of a guardian and maintenance: but the queſtion aroſe upon the claim of Lady *Catherine A. S. Oſborn*, to two legacies of 10,000l. In oppoſition to that claim, the Duke of *Leeds* offered evidence of converſations of the late Duke with the Ducheſs, and with *George Brooks*, his Grace's agent, upon the ſubject of the proviſions for the younger children. The Ducheſs of *Leeds*, by her depoſitions, ſtated, that five weeks after the birth of Lady *Catherine*, the teſtator informed her he had made a proviſion of 10,000l.

for her, (Lady *Catherine*) by a codicil; and in frequent conversations he uniformly declared his intention to give his younger children 10,000l. each. Mr. *Brooks* stated, that soon after the birth of Lady *Catherine*, the Duke observed to him at various times, that as she had not any provision he would make a memorandum or codicil, by which he would give her 10,000l. About a month after her birth, he told the deponent he had made a codicil, by which he had given her 10,000l. repeating that he had done so, because she had not any other provision; and it was his intention, that she should have as large a provision as Lord *Sidney*, except the stocks given to him in addition to the said 10,000l.; that upon creating the charge for his son in 1797, he declared, he would revoke the legacy to him of 10,000l. and frequently before had declared, he had given him all his *India* stock and government securities; and expressly declared, that he gave such funds, that his son might have them over and above his 10,000l.—The questions were, first, whether the plaintiff Lady *Catherine* was entitled to *two* legacies of 10,000l. or to *one* such legacy only; secondly, whether the evidence could be read in opposition to her claim of two legacies.—And the *Master of the Rolls*—" The question is, whether, according to the true construction of the will and the third codicil, and under the circumstances, the legacy by the codicil is accumulative and additional, giving a second provision by way of portion of 10,000l. above that provided by the will. In the course of the cause evidence was offered on the part of the Duke of *Leeds*, the executor and residuary legatee, to prove, that the legacy was not intended to be accumulative, from declarations by the testator as to the portions he intended for his younger children. An objection being taken to receiving the evidence, it was fully argued; and I confess, I felt some doubt upon the point: but it occurred to me, that upon consideration of the question arising upon the will and codicil, it might be unnecessary, if I should form my opinion upon the will and codicil, to come to any determination upon that point as to admitting the evidence; which I should be very glad to avoid; and I have satisfied myself, that upon the true construction of the will and codicil, and the circumstances, under which they were made, there is no necessity to resort to evidence to support the construction of the executor; being of opinion, that this legacy, according to the true construction of the will and codicil, is not to be held accumulative, but is only a gift of the same portion and provision by the testator to his daughter by name, to which before she was entitled under the description of after-born children. Being of this opinion, it is better for me to say little upon the evidence. I should have found great difficulty in admitting it. It does appear most clearly, if the report is right,

that Lord *Thurlow*, in *Coote* v. *Boyd*, thought it admiſſible on either ſide (*p*). His Lordſhip did admit it upon that ſide upon which, if this plaintiff is right, it was not neceſſary; for it is contended, that it is an eſtabliſhed rule, taken from the ſpiritual court that two legacies are accumulative, if given by two inſtruments. If that is a rule, I admit, I cannot raiſe a preſumption by evidence againſt it; and I am inclined to think, it muſt be taken to be a rule. But in *Hooley* v. *Hatton* (*q*), from which that is taken, the authorities, from which that rule is deduced, had no idea but that evidence is admiſſible, and it is ſtated by the writers upon the civil law, that the legacies ſhall be accumulative, if by two inſtruments, unleſs the executor can ſhew evidence to the contrary. If it is taken as a rule of this court, it would be a violation of it to admit evidence to raiſe a preſumption againſt it. I ſhould therefore, if it is taken as a rule in this court, be very unwilling to let in evidence againſt it, firſt for the executor. It was taken for granted in many caſes, and even in *Hooley* v. *Hatton*, that it would be admiſſible; and in *James* v. *Semmings* (*r*), it ſeems from one paſſage in the report, as if the court doubted, whether parol evidence would not have been admiſſible; though the determination was upon the inſtruments themſelves, that they were not accumulative. I will ſay no more upon the point as to the admiſſibility of the evidence; only deſiring to be underſtood not to give any opinion upon it whatſoever. The queſtion then is to be conſidered upon the will and codicil, taken together. Firſt, this is the caſe of father and child; and I muſt conceive, unleſs the court has been erroneous in eſtabliſhing the rule of preſuming againſt double portions, that is a very material ingredient. Upon the will, it is clear, that was the proviſion the teſtator thought ſufficient for his only then younger child, and any after-born children he might have. This being his intention and his object to provide for his younger children, he ſoon after by a codicil, gave to his ſon far ſhort of what he had given him by the will, but a conſiderable addition to it: viz. his money in the funds. It ſeems then to have been his intention to give his ſon that in addition; leaving the will to operate as to the legacy. Afterwards, thinking he might not have ſufficient, or perhaps, that he had not ſo certainly ſecured that proviſion to his ſon, as might be, he creates a truſt, which is only giving a real and ſpecific ſecurity for the ſame portion: but having done that, and another child being born, he immediately recurs to his will; and to put an end to any doubt, whether that ſhould be in addition, he makes a codicil, reciting, that he had otherwiſe ſufficiently provided for his ſon, which was only by that charge,

(*p*) Alſo in Ridges *v.* Morriſon, *ſuprà*. (*q*) *Suprà*. (*r*) 2 H. Black. 213.

and revoking the legacy to him by the will; thereby declaring it not to be his intention, that his ſon ſhould have the proviſion by the charge, and alſo the legacy; meaning, that 10,000l. ſhould be his only portion, with that ſmall addition by the prior codicil; and then he gives the ſum of 10,000l. to his daughter by name. It is ſaid, this is a gift to the ſame perſon of the ſame ſum in two ſeparate inſtruments; and therefore *ex neceſſitate*, it is an accumulation: but if I read this right, it is neither more nor leſs, than giving the portion to his daughter, as *perſona deſignata:* ſhe having come into exiſtence after the execution, and not being mentioned in it *nominatim*, but being merely included in the deſcription of after-born children. It is aſked, why he did not revoke the legacy to her. He did not mean it. He intended that legacy to ſtand. Whether he took a wiſe way to put it out of doubt is another queſtion; which is ſufficiently anſwered by the argument it has occaſioned. But we muſt conſider what might have been floating in his mind. It might, as has been ſuggeſted at the bar, occur to him, that it might mean children born after his death, and poſſibly that is the ſenſe in which he meant it, and knowing how critical lawyers are upon words, and thinking it neceſſary to guard againſt ſuch a conſtruction, he took that courſe with a view to put it out of doubt. I will put this caſe, and no one can doubt upon it. Suppoſe a teſtator, by a will made before his marriage, gave to any woman he might afterwards marry 2,000l. a year, by way of jointure; that afterwards he married, and then by a codicil gave his wife the ſame jointure: could it poſſibly be intended ſhe ſhould have two jointures? This is almoſt exactly the ſame caſe. There are two proviſions. I am not determining, and will not ſay, whether upon two proviſions, one by will and the other by codicil, without the circumſtances that exiſt in this caſe, the rule would or would not attach: but it would be going too far to permit this rule to operate, when I am ſatisfied to the contrary, and that there is ſufficient ground to ſay, the teſtator only meant a gift to his daughter by name of the ſame proviſion he before made for her as one of his younger children. The counſel for the plaintiff, aware of the difficulty that might be thrown in the way, aſked, whether it is a revocation or ſubſtitution? In the firſt caſe, as the legatee would loſe the benefit of the charge upon the real eſtate, that difficulty would ariſe, if I ſhould conſider this either as a revocation or a ſubſtitution. But, according to my idea, it is neither the one nor the other, but only a declaration, that the plaintiff ſhould have the ſame legacy as was given by the will to his after-born children. I have looked into moſt of the caſes. One occurred to me in which I was counſel *Heathcote* v. *Heathcote*, before Lord *Kenyon*, when

Master of the Rolls, in 1786, in which I have got my brief, with the notes I took on the back of the arguments on the other side. The point I perceive was exactly that in this case; whether the subsequent legacy was accumulative or a substitution. I looked into the decree, and it was held accumulative. Lord *Kenyon* did certainly rely much upon the rule supposed to prevail in *Hooley* v. *Hatton* (*s*). This case was before *Coote* v. *Boyd* (*t*), and the late cases; but it turned, as I conceive, from my notes, upon the words of the codicil themselves; by which it appeared the testator intended them to be additional. Having made a small provision considering his immense fortune, for the children by his marriage, *viz.* 15,000l. he made his will, having then only one son born: therefore he made no additional provision for younger children. Afterwards he had three younger children, and then he made a codicil, as it is called: but I much doubt whether he meant it to be testamentary, or only as a settlement to take place after his death, for there is not a word in it testamentary. His children then being very young, and he being possessed of the following sums of money, and stocks, (stating them) to the amount of 141,000l., out of these sums he gives 50,000l. each to two sons, and to his daughter 25,000l.; and he directed the remainder to be divided share and share alike, unless there should be any other younger child alive or born in due time after his death; and he declared, that by that paper he revoked any other provision he had made for younger children, except the settlement itself; and that he had to that set his hand and seal; and he did sign and seal it. This was in 1774. Afterwards, in 1783, he made a codicil, which he declares to be a codicil to his will, and directs to be taken as part of his will. He recites, that he had purchased several estates, and he charges all the estates purchased since making his will with the raising of the several legacies or sums of money after mentioned, limited to or in favor of his younger children after named. He then gave to his son *John* the legacy or sum of 45,000l. to his son *Robert* the legacy or sum of 45,000l. to *Elizabeth*, his daughter, 25,000l. which was the same as he had before given her; and to each and every other, that he might have, the legacy or sum of 10,000l. and he directs, that they shall take these legacies or sums exclusive of and over and besides any portion or portions, sum or sums of money, which may be provided either by the settlement, or by any deed or deeds, writing or writings, or by his said last will by him made and executed subsequent to his marriage settlement. Upon this case, Mr. *Maddocks* insisted, the word '*writings*' did not mean testamentary writ-

(*s*) *Supra*. (*t*) *Supra*.

ings, but by way of deed. But he ſays, by any deed or deeds, writing or writings, or by his ſaid laſt will.' He had given them no proviſion by his laſt will. I did not hear the judgment; which has been often quoted as ſtrong in favour of accumulative legacies; but, I think, it turned upon the ground I have mentioned."—All the judges, before whom this queſtion has been, have decided, that ſmall circumſtances will raiſe an inference againſt this accumulation. This caſe, I think, affords a ſufficient ground. Therefore, I am ſatisfied in declaring, that upon this will and codicil the plaintiff is entitled only to one legacy of 10,000l.; but it ſhall be particularly mentioned in the decree, that evidence was offered, and not read, without prejudice to the queſtion, whether it is admiſſible, or not."—The decree ſtated, that an objection having been taken for the plaintiff to reading the depoſitions of the Ducheſs of *Leeds* and *George Brooks*, in order to prove, that the Duke of *Leeds* did not intend to give the plaintiff under the deſcription of an after-born child a legacy of 10,000l. by his will, and a like legacy by his codicil, dated in *April*, 1798, which was offered by the defendant, the eldeſt ſon and ſole executor of the teſtator; without hearing the ſaid evidence read, but without prejudice to the queſtion as to the admiſſibility thereof, the court declared, that upon the true conſtruction of the will, and the codicil, of *April*, 1798, the plaintiff is not entitled to the proviſion of 10,000l. given by teſtator's will to each of his after-born children, and alſo to the legacy of 10,000l. given to her by that codicil.

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